REGISTERED No. D[illegible]

CENTRAL SECRETARIAT LIBRARY
Government of India,

The Gazette of India

EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

No. 34] NEW DELHI, THURSDAY, FEBRUARY 5, 1953

ELECTION COMMISSION, INDIA

NOTIFICATIONS

New Delhi, the 5th February 1953

S.R.O. 280.—WHEREAS the election of Shri Shankarrao Chindhuji Bedse of Sakri, West Khandesh District and Shri Soorji Laskari Valvi of Chinchpada, Nawapur Taluka, West Khandesh District, as members of the Legislative Assembly of Bombay from the Nawapur-Sakri constituency of that Assembly, has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Bakaram Sukaram Kokani of Mouje Shravani, Nawapur Taluka, West Khandesh District;

AND WHEREAS the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

ELECTION PETITION No. 25 OF 1952

CORAM:

Shri B. D. Nadkarni, B.A. (Hons.), LL.B.,—*Chairman.*

Shri J. R. Nazareth, M.A., LL.B.,

Shri M. G. Chitale, B.A., LL.B.,—*Members of the Election Tribunal.*

In the matter of the Representation of the People Act, 1951, and the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951;

AND

In the matter of the Election to the Bombay Legislative Assembly from the Nawapur-Sakri Constituency;

AND

In the matter of Election of Shankarrao Chindhuji Bedse and Soorji Lashkari Valvi.

Bakaram Sukaram Kokani, Hindu, residing at Mouje Shravani, Taluka Nawapur, West Khandesh District in the State of Bombay.—*Petitioner.*

Versus

1 Shankarrao Chindhuji Bedse, Hindu, residing at Sakri, West Khandesh District.

2. Abhramji Dongar Singh Chaudhari, Hindu, residing at Karanji in Nawapur Taluka, West Khandesh District.

3. Yeshwantrao Sakharam Desle, Hindu, residing at Kasare Taluka Sakri, West Khandesh District.

4. Soorji Lashkari Valvi, Hindu, residing at Chinchpada, Taluka Nawapur, West Khandesh District.

5. Sattarsingh Sona Vasave, Hindu, residing at Chinchpada, Taluka Nawapur, West Khandesh District.

6. Dharma Jairam Kokani, Hindu, residing at Mouje Shravani, Taluka Nawapur, West Khandesh District.—*Respondents.*

Shri S. T. More for the Petitioner.

Shri S. B. Kotwal and Z. B. Patil for Respondent Nos. 1 and 4.

Shri M. H. Shah for Respondent Nos. 2, 3 and 6.

Shri P. A. Patil for No. 5.

Shri V. G. Mudholkar, Dist. Govt. Pleader for the State under instructions from Advocate General.

JUDGMENT (per Shri B. D. Nadkarni, Chairman)

This is a petition by a candidate who had offered himself for election to the Bombay Legislative Assembly from the Nawapur-Sakri Constituency for which there were two seats, one of the two being reserved for the scheduled tribes. Besides the petitioner, ten other persons, who are shown as respondents in Ex. 1-I, filed their nomination papers, some of them describing themselves as candidates for the reserved seat also. The petitioner filed his nomination paper on 21st November 1951, which is at Ex. 60. In that nomination paper in the column meant for showing the tribe or caste, he described himself as Konkna claiming to be a member of that scheduled tribe. The scrutiny of the nomination papers was to take place on 27th November 1951 and at that time respondent No. 5 Sattarsingh Vasave filed a petition contending that the petitioner was not qualified to be elected for the reserved seat because he did not belong to any of the scheduled tribes mentioned in the Constitution (Scheduled Tribes) Order, 1950, issued by the President of India. The objection that was raised was heard by the Returning Officer and upon the evidence that was produced before him he rejected the nomination paper filed by the petitioner with the result that he could not offer himself for election that was held subsequently on 7th January 1952. In the course of that election, respondent No. 1 was declared as elected for the general seat and respondent No. 4 Soorji Lashkari for the reserved seat. Thereafter, the petitioner presented an application dated 20th February 1952 mentioning as respondents only such of the candidates who had actually contested the election excluding those as had previously withdrawn their nomination. The petition was received by the Election Commission on 25th February 1952. Thereafter, on 14th March 1952 the petitioner sent another petition adding as respondents those who had originally filed their nomination but who had withdrawn, the contentions raised in the petition being the same as those mentioned in the original petition. His Attorneys sent a covering letter that the first petition may be allowed to be withdrawn treating the second one which had been filed within the time allowed under the Act as original. This was received by the Election Commission on 30th March 1952. The Election Commission replied to the petitioner's Attorneys that it did not wish to pass any orders and the question will be left to be decided by the Tribunal that would be appointed to hear the petitions. After appointment of this Tribunal both the petitions have been forwarded without passing any orders to be dealt with according to law.

2. The main contention of the petitioner raised in the petition is that as he belonged to a scheduled tribe *viz.*, the Konkna tribe, the rejection of his nomination paper by the Returning Officer is improper and has resulted in affecting materially the result of the election to the said Constituency. He, therefore, prayed that the whole election to the Nawapur-Sakri Constituency be declared void and such other relief as may be necessary be granted to him.

3. Respondent No. 1 contended *inter alia* that the petitioner did not belong to the Konkna tribe as claimed by him and, therefore, the rejection of his nomination paper by the Returning Officer was quite proper, that the petition was bad for want of necessary parties as the original application did not join as respondents all the candidates who were duly nominated, and that application for withdrawal of the defective petition raised a bar to the second. It was denied that the results of the election were materially affected by the rejection of the petitioner's nomination paper. Respondent Nos. 4 and 5, namely the successful candidate and the candidate who had objected to the nomination, supported the contentions of respondent No. 1.

But respondent No. 2 Abhramji Dongarsing, respondent No. 3 Yeshwantrao Sakharam Desle and respondent No. 6 Dharma Jairam supported the contentions of the petitioner.

4 The following issues were framed at Ex. 41 by the Chairman which were subsequently confirmed by the Tribunal:

(1) Having regard to the fact that two petitions have been filed before the Election Commission whether the latter is not competent as an Election Petition?

(2) Has the Tribunal no jurisdiction to treat the second petition as an amendment of the first petition?

(3) If it has, is the second petition not tenable as an amendment in spite of the fact that it is filed within limitation, on the ground that the petitioner has not moved the Tribunal to treat it as an amendment? Is such a course affected by limitation now?

(4) If the second petition is not tenable either as a petition or as an amendment, is the first petition tenable having regard to the fact that all the parties were not impleaded in it?

(5) Is the Returning Officer a necessary party in view of section 82 and is the petition bad on the ground that he has not been impleaded?

(6) Is the petitioner estopped from raising the contention that he belongs to the Konkna tribe in view of the reply which he had given to the objection raised against his candidature?

(7) If not, does the petitioner prove that he belongs to the Konkna tribe declared to be scheduled tribe in the Constitution (Scheduled Tribes) Order of 1950 and therefore his nomination paper was improperly rejected?

(8) If so, is the result of the Election materially affected by the improper rejection?

(9) What order?

The findings of the Tribunal on the issues are:

(1) The latter can be treated as an amendment to the former, if necessary. However, amendment is not necessary.

(2) The Tribunal has jurisdiction.

(3) It could be tenable. But the findings are unnecessary in view of finding on issue No. 1.

(4) Does not survive.

(5) Not pressed; in the negative.

(6) In the negative.

(7) In the affirmative.

(8) In the affirmative.

(9) As below.

5, It will appear from the facts stated above that in the first petition that had been sent by the petitioner to the Election Commission, he had not impleaded as parties such of the candidates as had filed their nominations but who withdrew from the contest by the date fixed for the withdrawal of candidatures. However, upon the belief that such candidates may also be necessary parties, the petitioner had sent to the Commission a fuller petition impleading also those who had withdrawn their nominations. While sending this petition the Attorneys of the petitioner requested the Commission for leave to withdraw the first petition. But the Election Commission without passing any orders forwarded both the petitions to this Tribunal. As it appeared that the petitioner wanted to treat the second petition as the main petition and had sought leave to withdraw the first petition, even though no orders had been passed upon it, respondents 1 and 4 took a contention that two petitions in regard to the same election were not tenable, that the first petition was bad for want of proper parties, that the second petition could not be treated as an amendment of the first because the Tribunal had no power to grant the amendment, that withdrawal of the first would raise a bar against the second, and, therefore, both the petitions were untenable. It is these contentions which have given rise to the first four issues framed above. Similar contentions had been raised in Election Petition No. 72 of 1952 before this Tribunal and it was held, firstly that it was within the powers of the Tribunal to grant an amendment, that candidates who had withdrawn their candidatures though necessary parties could be impleaded by an amendment subsequently, and that the

Tribunal was not bound to dismiss the petitions. The findings of this Tribunal on the preliminary points were the subject-matter of a Special Civil Application (No. 2017 of 1952) under Articles 226 and 227 of the Constitution of India before the High Court and Their Lordships have decided that the Tribunal had power to grant the amendment, that the candidates who had withdrawn their nominations were not necessary parties to an election petition and, therefore, an election petition filed without them was not bad. In view of this decision of Their Lordships the contentions giving rise to issue Nos. 1 to 4 have not been argued before us though not expressly given up. The contention giving rise to issue No. 5 also has not been pressed before us. Hence our findings on these issues as recorded above. The only points that survive for consideration are those covered by issue Nos. 6, 7 and 8.

6. It is necessary to state briefly the facts that led to the rejection of the petitioner's nomination paper by the Returning Officer. The nomination paper filed by the petitioner on 21st November 1951, which is at Ex. 60, describes him in Column 6 as अनुसूचित जमात कोकणा (Scheduled Tribe—Konkna). The petitioner made a declaration to that effect at the foot of the nomination paper. Respondent No. 5 Sattarsing filed his objection, Ex. 1-C, contending *inter alia* that the petitioner belongs only to the Konkni "community" but not to the Konkna "tribe" as he wanted to maintain that Konkni community is not included in the Constitution (Scheduled Tribes) Order which recognizes only the Konkna tribe, and that the Educational Department has declined to grant concessions to Konkni pupils as they do not belong to the backward class or community. In reply to this objection, the petitioner filed his statement, Ex. 1-D, that the objection taken is not valid because those who describe themselves as Konkni have been admitted by the Government to belong to the Konkna "caste" and that those students calling themselves as Konkni have been granted the educational concessions. In support, he filed an affidavit of his father that he (father) belongs to the Konkna "tribe" and further produced a certificate from the Probationary Deputy Collector who was working as Mamlatdar of Nawapur that the petitioner belongs to the Konkna "caste" recognized as a backward class, and also a letter from Under Secretary to the Government of Bombay, Education Department, recognizing the Konkna "caste" students calling themselves Konkni or Konkni Kunbi students as backward class for the purpose of educational concessions on production of the requisite certificate. The Returning Officer on the evidence produced before him held that the petitioner belongs to the Konkna "caste", but not the Konkna "tribe", as mentioned in the Constitution (Scheduled Tribes) Order and rejected the petitioner's nomination paper. It might be observed here that the Returning Officer did not accept the petitioner's nomination paper even for the general seat upon the ground that the deposit paid by the petitioner was a smaller amount according to the concession available only to the scheduled tribe and, therefore, not the proper amount.

7. On these facts, which are not disputed, two contentions have been raised on behalf of respondent No. 1. Firstly, it is contended that as the petitioner in his reply to the objection described himself as belonging to the Konkna "caste" and not the Konka "tribe", he is estopped from now contending that he belongs to the Konkna tribe. Secondly, it is contended that in view of the description of his caste made by the petitioner himself and in view of the material that was before the Returning Officer, if his conclusion cannot be challenged as wrong, it will not be open to the petitioner at this stage upon the new evidence produced before the Tribunal to say that the rejection of the nomination paper by the Returning Officer was improper. These two contentions have direct reference to the scope of enquiry by the Returning Officer and, therefore, can be dealt with conveniently together.

8. S. 36 of the Representation of the People Act deals with the procedure and scope of enquiry by the Returning Officer in the matter of scrutiny of nomination papers. Sub-section (2) mentions in clear terms that the findings to be recorded by the Returning Officer as indicated in clauses (a) to (e) have to be based upon a summary enquiry, if any, either in pursuance of an objection or on his own motion. In fact, sub-section (5) requires the Returning Officer peremptorily to hold scrutiny on the appointed date except where such proceedings are interrupted or obstructed by riot or open violence or causes beyond his control, and reserving to him the liberty of adjourning for 24 hours where a candidate is required to meet an objection. Therefore, opportunity of only 24 hours is afforded to a candidate to get evidence to meet the objection. All these provisions, therefore, cannot fail to indicate that the scope of enquiry by the Returning Officer at the time of scrutiny of nominations is of a summary nature and consequently limited and that the object is to ensure that everything connected with the election, proceeds according to the time schedule postponing all disputes to be raised by petitions

after the elections are completed. The Tribunal finds support for this view from the decision of the Bombay High Court in Shankar *v*, Returning Officer, Kolaba 54 Bom. L.R. 137, where His Lordship the Chief Justice has observed at page 142 of the report:

> "It is hardly necessary to emphasise the importance of elections to a democracy, and it might lead to serious consequences if elections were unduly postponed. Therefore, the object was to postpone all matters of controversy, all disputes and all differences till after the elections had gone through according to the time schedule."

If under section 100(1)(c) of the Representation of the People Act improper rejection or acceptance of a nomination which affects the results of an election materially, provides a good ground for setting aside an election by a Tribunal, the inevitable inference by reading sections 36 and 100 together must be that the proceedings relating to scrutiny being of a summary nature, the decision as to the propriety or otherwise of the order of the Returning Officer is left, may reserved, to be decided by a Tribunal in an election petition in that behalf and, therefore, the Tribunal's enquiry cannot be limited only to the material that was placed before the Returning Officer. That this is the only possible view will be clear by considering another aspect. Where, for instance, the Returning Officer accepts or rejects a nomination paper *suo motu,* the only stage when a party can show that the Returning Officer is wrong is in the course of an election petition by leading evidence.

9. There is no rule in the Representation of the People Act which prevents a party from explaining his prior statement. And, in this case, if the petitioner wants to show before the Tribunal what he meant when he stated that he belongs to Konkna "caste", there is no rule in the Act which can estop him. Even under the general law of estoppel there is no bar against the petitioner's showing that he, in fact, belongs to the Konkna tribe although he stated earlier that he belongs to Konkna caste, because he has thereby put no party to any disadvantage by his stating that he belongs to the Konkna "caste". His present contention that he belongs to the Konkna "tribe" is not inconsistent with his claim in the nominatio paper; he has nowhere conceded that there is a separate tribe called "Konkni tribe as distinguished from "Konkna" tribe. Nor has he at any time conceded that he does not belong to Konkna tribe. In fact, it appears to the Tribunal that the proper forum for the petitioner to explain his stand fully for the purpose of showing that the Returning Officer's order is wrong and improper being only before the Tribunal, there is no force in the contention on behalf of respondent No. 1 that the petitioner is estopped from showing that he belongs to the Konkna tribe merely because he used the word "caste" instead of "tribe".

10. The next important question that requires to be considered is, whether the petitioner proves that he belongs to the Konkna tribe declared to be a scheduled tribe in the Constitution (Scheduled Tribes) Order, 1950, which gives rise to issue No. 7 above. It will appear that the President of India has made what is called the Constitution (Scheduled Castes) Order of 1950 under Article 341 of the Constitution of India and the Constitution (Scheduled Tribes) Order of 1950 under Article 342 of the Constitution of India. In the first of these, different castes in different States are enumerated as scheduled caste, and, in the second, different tribes in the different States are described as scheduled tribes. In the Constitution (Scheduled Castes) Order, there is no mention of either Konki or Konkna in the Bombay State. But, in the Constitution (Scheduled Tribes) Order, there is mention of only Konkna but not Konkni as one of the scheduled tribes in Bombay State. It is important to observe that the scheduled castes or tribes are not mentioned district-wise but the enumeration refers to the whole of the State. The nomination paper of the petitioner is at Ex. 60 and in the column reserved for mention of the scheduled caste or tribe, the petitioner mentioned Konkna as his tribe. When an objection was taken at the time of scrutiny by respondent No 5 Sattarsing, the Returning Officer found the petitioner to be of Konkna "caste" but not of that "tribe", and as the Konkna caste is not mentioned in the Constitution (Scheduled Castes) Order, the petitioner could not contest for the reserved seat. The main ground on which the objection was founded was that the petitioner does not belong to the Konkna tribe because certain educational concessions granted to the backward or scheduled classes had not been allowed to the petitioner's community and this ground appears to have attracted much, if not all, attention at the time of the scrutiny of the nomination paper, though granting of educational facilities by itself could not be a conclusive test in determining the tribe or the caste of the petitioner for the purpose of the Constitution Orders. The petitioner's contention before the Tribunal is that those

known as "Konkni" in the West Khandesh District are really of the Konkna tribe that is mentioned in the Constitution (Scheduled Tribes) Order. In fact, the petitioner has brought forward evidence to show that members of the Konkna tribe exist in large numbers in the West Khandesh District and they are no other than the people known as Konkni. The contention of respondents 1 and 5 is that the tribe existing in West Khandesh is Konkni and that there are no Konknas at all in West Khandesh. The petitioner has met this contention by trying to show that no caste or tribe known as "Konkni" exists anywhere in the Bombay State though Konknas are called so in Khandesh. In view of these contentions, the points that arise for consideration before the Tribunal are, (1) whether Konkna tribe exists in the West Khandesh District, and (2) whether the petitioner belongs to that tribe.

11. A number of witnesses have been examined for the petitioner to establish that Konknis as they are known in West Khandesh are the same as Konkna tribe mentioned in the Constitution (Scheduled Tribes) Order. In fact, it is suggested, and not without force, that possibly the difference between the two expressions being only of one vowel, the difference has resulted more by habitual utterance than due to the existence of real difference between the two. In Marathi language, it is not uncommon to find similar variations in uttering the names of either individuals or communities. For instance, "Vasava" a name of community or tribe is known as "Vasave" and such variation is far too common in the utterance of names of individuals. There will be occasion to show while dealing with the documentary evidence in this case that till the two Constitution Orders *viz.*, Constitution (Scheduled Tribes) Order and Constitution (Scheduled Castes) Order were made, no distinction was made between "castes" and "tribes", which do not appear to have been defined in the above Orders. Even the Government documents relating to the Census do not make any distinction between caste and tribe while describing the same communities that exist in West Khandesh.

12. The main points attempted to be established by the oral evidence led on behalf of the petitioner are that (1) those who are described as Konknis in the West Khandesh District are really Konknas, (2) as Konkna is included in the scheduled tribes, nominations of members of the petitioner's community have been accepted for reserved seat both in this District as well as the Nasik District, for the Local Board elections as well as the Assembly elections, and (3) relations of the petitioner are known in the Nasik District as Konkna though Konkni is the name commonly used in the West Khandesh District. To establish these allegations the petitioner has examined besides himself, Dharma Jairam Ex. 89, a cousin of his brother-in-law and whose nomination paper for the reserved seat was accepted by the same Returning Officer at the same time though he belonged to the same community as the petitioner, Shankar Gangaji Ex. 92, the brother-in-law of the petitioner and cousin of Dharma, Gokul Rupla Ex. 93, who had been elected to the Local Board for a seat reserved for the scheduled tribe or caste, and Abaji Ragho Ex. 95, who comes from the Nasik District claiming to be of the same community as the petitioner and whose nomination paper for the Assembly had been accepted in the Nasik District. From the evidence of all these witnesses it is clear that no distinction is made by the people between Konkna and Konkni at least in West Khandesh District, or. for that matter between a caste and a tribe, and that though Konkni is not mentioned as a scheduled tribe, nominations of persons calling themselves "Konkni" for a seat reserved for the scheduled tribe have been accepted both in this District as well as in Nasik. There is considerable support for these allegations made by the witnesses from the admission of respondent No. 1, Ex. 103, that he understands caste and tribe to mean the same thing and even from the evidence of Sattarsing, Ex. 100, who had raised objection to the nomination of the petitioner before the Returning Officer. He admits that though respondent No. 6 Dharma Jairam belongs to the same community as the petitioner, he did not raise any objection to his nomination paper in the same manner as he did for the petitioner's nomination. In fact, Ex. 61, the nomination paper of respondent No. 6, shows that it was accepted by the Returning Officer even though the description of his tribe contained in it was the same as in the petitioner's nomination paper. The explanation given by the witness that he believed that the one objection that was raised would cover both is not at all convincing. In fact, the witness does not appear to be straightforward when he says that though respondent No. 6 was more influential, he did not take any objection in the belief that the first objection was sufficient. This only indicates anxiety on his part to try to show that the petitioner was not more influential and, therefore, result of this election is not materially affected by rejection, even if improper. There is one important admission in the evidence of this witness, namely, that the community of the petitioner which he disputes to be Konkna is included among the sixty to sixty-five thousand voters of the scheduled tribe in the Nawapur-Sakri Constituency, admitting thereby that the petitioner and all the members of his community are included among the scheduled tribes. And it is admitted by respondent No. 1 that

except the community of the petitioner called by the name Konknis there is no other community called Konkna.

13. A few general observations are necessary before referring to the documentary evidence relied upon on behalf of the petitioner. The main purpose of that evidence is to establish firstly that there is only one community that is called differently as Konkna and Konkni which is a scheduled tribe, that this different nomenclature has been adopted even by the Government in the Census record of different years, and that if Konkna mentioned in the Constitution (Scheduled Tribes) Order does not refer to the petitioner's community, there is no such community existing in such Districts as Ratnagiri, Kolaba or Kanara which form part of Konkan so as to justify inclusion of Konknas in the Scheduled Tribes Order. Objection has been taken for the first time during the arguments to the admissibility of the record relating to the Census of different years that is exhibited in this case. Relying upon Emperor v. Bhavanrao 6 Bom. L.R. 535 it was argued on behalf of respondent No. 1 that Census record is inadmissible. It is clear from the judgment in that case, which is a short one, that what Their Lordships have considered is not the admissibility of the record but the presumption of correctness as to the contents, or, in other words, probative value to be given to that evidence. It is not disputed that all the record which consists of Exs. 64, 65, 66, 71, 76, 77, 81 and 102 is Government record. It has been called for and got produced from proper custody. There is, therefore, no scope to doubt the genuineness of the record. In fact, no objection was taken when the several witnesses summoned to produce the record appeared and produced it explaining the custody. Therefore, it is too late for respondent No. 1 to raise objection as to the admissibility of these documents on record, though it might be open to him to challenge its probative value.

14. It will appear from the evidence of respondent No. 1 and the objector Sattarsing, respondent No. 5, Exs. 103 and 100, that there are no two distinct communities as Konkni and Konkna in the West Khandesh District, that there is only one community called Konkni, and that the said community is included among the scheduled tribe voters in the electoral roll. Ex. 110 is a list submitted to the Government by the Collector of West Khandesh prepared village-wise showing in each village the number of scheduled caste voters and scheduled tribe voters. From this document it will appear that in the village of Shravani, which is the village of the petitioner which was formerly in Nandurbar Taluka but now included in the Nawapur Taluka, the total number of voters in 1950 was 421 out of which only 2 are scheduled caste voters and 409 scheduled tribe voters. The majority of the population in this village which has a total voting population of 421 is shown as belonging to a scheduled tribe. If a reference is made to Ex. 76 which is the National Register of Citizens made at the time of the census, it will be seen that the majority of names in the village of Shravani is of those described as Konknis and are further described as belonging to " खास गट " of which the translation would be "special group", and in Column 8 the caste of this majority is shown as Konkni. At Ex. 71 there is the Caste Table Compilation Register made at the time of the census of 1941 and from this document it would appear that in Shravani the total population was 842 out of whom 541, the majority, have been described not as Konknis but as Konknas, and 213 as Bhils. At Ex. 81 there is the Village Hand Book based upon the census of 1941, a Government publication available for sale at 8 annas per copy, which shows that in the village of Shravani the total population is 842, a figure which tallies with Ex. 71, out of which deducting 29 Hindus who are not tribal and 9 who are Muslims, the tribal population is shown as 804. It is very clear from these documents that the majority out of the total population of 842 in Shravani call themselves Konknis, that they are shown as tribal population and that they are shown under the "special group" and that there was no other community called Konkna in Shravani. The same remarks hold good regarding the record pertaining to the District also, because on the basis of the tribal population of the District inclusive of those who describe themselves as Konknis, one reserved seat is allowed for the Nawapur-Sakri Constituency in addition to one general seat. This is clear from Ex. 85 the Delimitation of Parliamentary and Assembly Constituencies (Bombay) Order, 1951, page 22, and there can be no doubt that this tribal population on the basis of which one reserved seat in addition to the general seat has been allotted includes that population known as Konknis, although according to respondents 1 and 5 no Konknas exist in that Constituency, or, for that matter in the whole of the District as distinct from Konknis. There is documentary evidence which will be referred to presently to show that the very persons described as Konknis have been described as Konknas in the Government record, and, therefore, all those described as Konknis in the electoral roll were at one time called Konknas without any distinction having been made between Konknis and Konknas. The documentary evidence consists mostly of the record of the census of 1911, 1931, 1941 and 1951.

15. While the petitioner relies upon record relating to the census of the year 1941 to show that the people of his community were described as Konknas, on

behalf of respondents 1 and 5 reliance is placed upon the Enumeration Register of Sakri Taluka in the course of the census of 1931, which is Ex. 102, to show that the members of the petitioner's family and of his community mentioned Konkni as their caste to the several enumerators and it is pointed out relying upon Ex. 102, that the petitioner's community did not describe themselves as tribe but as caste. But if respondents 1 and 5, nay their witnesses also, do not make any distinction between a tribe and a caste, as is admitted in their depositions, and if as stated by the petitioner and his witnesses that though they are Konknas, they are called Konknis in this District, the fact that when the enumerators came, they gave their caste as Konkni cannot prevent them from establishing that they really belonged to the Konkna tribe. It is important to note that even in the Government documents themselves they have been described differently as Konkna and Konkni at different times. The most important document in this connection is the Caste Table of the Bombay Province based upon the census of 1941, a Government publication available for sale as will appear from the matter printed upon the cover. It was contended for the respondents relying upon the 6 Bom. L.R. case cited above that the statements contained in it cannot be presumed to be correct. But the very description of the publication would show that the same as well as Ex. 81 which were published in the year 1942 had been published after completion of the census undertaken by the Government and that they have been based upon material that had been collected in due course of business prescribed by the order of the Government. The probative value to be attached to such record published after completion of the census by following the procedure prescribed must necessarily be higher than mere statements made to the enumerators during the progress of the census. While in the census record pertaining to the year 1931 (*vide* Ex. 102) there is no use of the word "tribe" but only "caste" in relation to the community of the petitioner which is described as Konkni, in the census record of 1941 the word "tribe" has been used and from the sub-heads it will be perfectly clear that Konknas mentioned in it must necessarily have included those known as Konknis. The Caste Table has been prepared by dividing the population under the heads, Scheduled Castes, Tribes, other Hindus under the main heads, Hindus, Muslims, Indian Christians, etc. At page 30 of the Table under the general class "Tribes" are enumerated different communities which include only Konkna but not Konkni. The Table relates to the whole of the Bombay State and it will appear that neither among the scheduled castes nor among the scheduled tribes is there mention of Konknis anywhere. No community called "Konkni" is shown as existing in the whole of the Bombay Province in 1941 in any District. On the other hand, there is specific mention of the community Konkna under the head "Tribes". Out of the total population of 90105 of the Konkna tribe in the whole Province, it will be found that West Khandesh District has 29611. In Ex. 81, the Village Hand Book of the West Khandesh District, further village-wise details of this population have been given and instead of taking a general total, if the village of Shravani is referred to in this book for test, it will be found that these Konknas shown under the heading "Tribe" are no other than Konknis, there being no other Konknas in that village or the whole of the District as distinguished from those called Konknis as admitted by the respondents. There is, therefore, no doubt about the fact that the very community the members of which mentioned their caste as Konkni in the course of the census of 1931, have been described as Konknas coming under the general class of "tribe" in the course of the census of the year 1941; or, in other words, Konknis and Konknas in the West Khandesh District are an identical community and there was no community at all as Konknis that was recognized by the Government in the whole of the Bombay Province in the census of 1941. What appears to the Tribunal, therefore, is that "Konkni" which has not been mentioned as a caste or a tribe in the enumeration of castes in the census of 1941 is a loose description applied to groups of persons having reference to the place of origin from where they might have migrated or to geographical description of the people coming from particular parts of the State.

16. On behalf of respondent No. 1, the correctness of the description in the Caste Table, Ex. 65, that Konkna is a tribe that exists in a large number in West Khandesh District is challenged by referring to R. E. Enthoven's book "The Tribes and Castes of Bombay", Volume II, 1922, page 265, wherein the learned author has observed that Konknas numbering 72678 are chiefly found in Surat, Dharampur and Bansda without mentioning Khandesh, Nasik or Thana. It is also pointed out referring to the Bombay Gazetteer, Khandesh District, that at page 105 the community existing in Khandesh is described as Konknis whereas there is no reference to Konknas at all. It seems to the Tribunal that the argument based upon these two books assumes much more than is warranted by the statements in the two books. The statement in Enthoven's book does not pretend to be exhaustive, for, what is mentioned therein is that Konknas are "chiefly" found in the three Districts, which does not mean that they did not exist in other Districts. Secondly the learned author has himself observed that Konkni is a territorial name and that

the name Konkna indicates that they are a tribe from the Konkan probably named upon immigration and he infers that they are one of the tribes from Thana even though he does not mention Thana itself among the Districts where they exist. Obviously, therefore, the description is not exhaustive nor can it mean to say that the term "Konkna" was at any time recognized as a caste as such, it being a name given to the tribe on account of their migration from Konkan. On the other hand, there is material in the Khandesh Gazetteer to show that the word "Konkni" is not a caste but that they began to have that name by way of a description with reference to the part from which they had migrated. Referring to "Konknis" it is mentioned therein that they claim that their ancestors originally came from the Konkan and this, their name and their appearance which very closely resemble that of the Konkan Thakurs bear out (*vide* page 105). Therefore, the observations in both the books indicate that both the expressions "Konkni" and "Konkna" have their origin to Konkan, part of the Bombay State, from where the tribes claim to have migrated into different Districts. And, therefore, it is very probable that in some parts they happened to be called Konknis and in others as Konknas, both having reference to the groups of an identical tribe whose ancestors had migrated. That those described as Koknis were a tribe deserving to be included in the scheduled class is clear from the statement at page 105 of the Gazetteer that Konknis though often confounded with Bhils claim to be superior to them and that living in the same part of the country as the Gavits, they rank below them and unlike them have no special dialect. It is, therefore, clear that there is no real difference between Konknis and Konknas, and that the two expressions having reference to the territory from which the people had migrated they came to be known in some parts as Konknis and in others as Konknas. This will be further clear on a reference to the Gazetteers of Thana and Nasik. Though Enthoven mentions that Konknas referred to by him migrated from Thana, the Thana Gazetteer does not mention any Konknas but only Konknis as being among the early tribes (*vide* pages 60 and 153 of the Gazetteer). The Nasik Gazetteer while it does not mention Konknas, mentions Konknis as a tribe having Muslim religion being descendents of the Arab and Parsian refugees who have nothing in common either with Konknas or Konknis (*vide* page 77). But at page 47 of the Nasik Gazetteer there is another reference to Konknis among the Hindus which describes them as immigrants from Thana who have spread into the Dangs and up the western spurs of the Sahyanri hills. In fact, these parts are close to the parts of Khandesh where the petitioner's community is to be found. And the description is very akin to the description of the Konknis given in the Khandesh volume of the Gazetteer. Supplementary Volume XIII-B giving statistical tables which, it may be noted, were edited by Mr. Enthoven the author of the book referred to above, relating to the Thana District describes only Konknis but no Konknas in the census of 1901 though it was the case of the respondents that Konknas are to be found only in the Konkan part. But Volume XII-B issued as supplementary to the Gazetteer of Khandesh mentions in table VI existence of the tribe of Konkna but not Konkni based upon the census of 1911 in Nandurbar and Nawapur. It may be pointed out that the villages inhabited by the petitioner's community were originally included in Nandurbar though subsequently included in the Sakri Taluka. Curiously enough, in this volume based upon the census of 1911 there is no mention of Konknis at all but only Konknas, a fact indicating beyond doubt that no distinction was made between Konknis or Konknas. And, in a similiar volume XII-B of the Khandesh Gazetteer edited by Enthoven based upon the census of 1901 there is neither reference to Konkni nor Konkna, presumably because they might have been included among the Bhils.

17. From all this material it appears to be plain to the Tribunal that Konknis and Konknas are identical, that they have been described differently not only in different Districts because the description is based upon the territory from which they had migrated, but also in the same District of Khandesh at different times. But one thing that is clear to the Tribunal is that Konknis or Konknas were a tribal community, very backward, ranking with Bhils and Vasavas, and, therefore, included among the scheduled tribes. If as is shown by the Caste Table based upon the census of 1941 there exist no Konknis as a caste or a tribe in the whole of the Bombay State and Konknas in a large number are existing in Khandesh, the contention that Konknas mentioned in the Constitution (Scheduled Tribes) Order has no reference to Khandesh but some other part of the Bombay State cannot be accepted. On the other hand, the admission on behalf of the respondents that those described as Konknis are included among the voters of the scheduled tribe in the electoral rolls coupled with the fact as shown by the Delimitation Order, Ex. 85, that a reserved seat is granted by reason of the number of scheduled tribe voters which includes the petitioner's community, give rise to the irresistible inference that the word "Konkna" used in the Constitution (Scheduled Tribes) Order has reference to the petitioner's community which

happens to be known as Konknis in the West Khandesh District. It was urged in the course of the arguments that the petitioner has not brought any evidence of habits and customs to show that those of the petitioner's community are the same as those of the communities described as Konknas by Enthoven. But it may be pointed out that where there is record itself indicating that the same tribe is called by two names with a very slight difference, not only in different districts but even in the West Khandesh District itself, this evidence would be much safer for reliance than customs at marriage or burial of the dead which are fast undergoing changes especially among the tribal population which is coming in contact with civilization and for the uplift of which every effort is being made. The Tribunal, therefore, holds that the petitioner's community though known by the name Konkni is really of the tribe described as Konkna in the Constitution (Scheduled Tribes) Order and, therefore, the Returning Officer improperly rejected his nomination.

18. It has been contended on behalf of the respondents that such a finding would amount to amendment or rewriting of the Constitution (Scheduled Tribes) Order. In fact, this point was allowed to be raised on an application, Ex. 111, on behalf of the respondents because the contention purported to raise the question of jurisdiction. But it will appear from issue No. 7 raised in the case that the real point at issue is whether the petitioner belongs to the Konkna tribe which is the name adopted for a particular group or class of people in the Constitution Order. The evidence discussed above is precisely from that aspect and the finding recorded is to the effect that though known as Konknis in the particular part of the Bombay State *viz.* West Khandesh, the tribe is really Konkna. Therefore, the enquiry before the Tribunal and the finding do not claim or aspire to determine whether the mention of the name is inaccurate in the Constitution Order, but whether a particular group or groups are included within the nomenclature or the description adopted in the Constitution Order. It may be pointed out in this connection that both in the Constitution (Scheduled Tribes) Order and the Constitution (Scheduled Castes) Order a clear mention is made that the name of the tribe or the caste as the case may be mentioned in the Schedule shall be deemed to include groups, parts, etc., of that tribe or caste residing within the localities under which they are mentioned. It is obvious from this that it was fully realised at the time of the framing of that Order that the mention of a particular tribe may not by itself be complete or exhaustive in relation to the parts of that tribe. It is no doubt true as pointed out on behalf of the respondents that wherever possible different names of the same tribe are mentioned in the Order. But it cannot be said that in all the cases all the names have been given, where, for instance, in a smaller area in the State a different name in a slightly modified form is in use. If the Tribunal is satisfied that in the name that is adopted or mentioned in the Constitution Order there are included certain castes, groups or communities, it would not amount to amendment of the Constitution Order or rewriting of it as contended and consequently it cannot be said to be beyond the jurisdiction of the Tribunal to hold that the particular caste, community or group comes within the tribe mentioned in that Order.

19. The next question is, whether by the improper rejection of the nomination paper the results of the election have been materially affected, because under s. 100(1)(c) of the Representation of the People Act an election can be declared to be void on the ground of improper rejection of any nomination only where the result of the election has been materially affected. The further question that has to be considered by the Tribunal is whether the whole election will have to be set aside or only that part which affects the seat reserved for the scheduled tribe. In this connection, on behalf of the respondents it is urged that the election of respondent No. 1, who does not belong to the scheduled caste or tribe but who is elected to the general seat, need not be disturbed. But the Tribunal is of the view that if the result of the entire election is found to be materially affected by the improper rejection in view of the procedure to be followed for declaration of results of election in a Constituency containing general and reserved seats, it will not be possible to set aside the election only partially.

20. While evidence has been led on behalf of the respondents to show that the petitioner would not have got more votes than Dharma Jairam having regard to the facts that he belongs to the same community as the petitioner, that he had been adopted by the Congress as a candidate and that Congress leaders had gone to work for him, the petitioner and his witnesses have tried to point out by evidence that the petitioner was better educated being in college and was doing better type of public work and was, therefore, likely to get more votes. Really speaking, these are matters of speculation. Account will have to be taken of personal factors of the candidate whatever party he may profess to represent in the matter of election. Their Lordships have observed in Shankar *v.* Returning Officer, Kolaba, 54 Bom. L.R. 137 at page 141:

> "How the voters would have voted and what the result of the election would have been if the petitioner had been a candidate would be

entirely a matter of speculation and no Tribunal, however well versed in election matters, could ever decide whether the result of the election would not have been different if the petitioner had stood as a candidate. Therefore, in our opinion, whatever the case may be when a nomination paper has been improperly accepted, as far as wrongful rejection of nomination paper is concerned, substantially the right of the petitioner is safeguarded under the Representation of the People Act."

It is not necessary to refer to a number of cases which lay down that where the nomination of a candidate is improperly rejected, there will be a presumption that by shutting him out the results are materially affected. And, that party which alleges that they are not so affected will have to establish by evidence that the contest by the candidate who was thus prevented would not have mattered. No doubt, it may be difficult for a party to establish what might or might not have been. But where it is apparent that a candidate whose nomination paper happens to be improperly rejected is not a non-entity but one that counts in the community on whose behalf he stands for the election, it will be reasonable to infer that he might have been supported not only by that community but also by voters of other communities who may have sympathy for him. The Tribunal, therefore, thinks that by denying an opportunity to the petitioner to contest the election, though he was entitled to do so, the result of the election is materially affected. The provisions of s. 54 of the Representation of the People Act which prescribe the special procedure at elections in Constituencies where seats are reserved for scheduled castes or scheduled tribes show that in circumstances like the present the whole election will have to be set aside but not in part, because a candidate belonging to the scheduled tribe has a right to be elected not only for the reserved seat but also to the general seat. The Illustration given in that section makes this amply clear. Therefore, the Tribunal holds in view of the findings above that the whole election is void by reason of improper rejection of the nomination of the petitioner.

21. Lastly, there remains the question of costs. In the opinion of the Tribunal, respondent No. 5, who raised the objection before the Returning Officer, and respondent No. 1, who has supported that objection in the course of the hearing before the Tribunal, must be held responsible for the costs in this case. It is clear from the evidence of respondent No. 5 that with full knowledge of the fact that the community of the petitioner and respondent No. 6 was a scheduled tribe, he took objection to the nomination of the petitioner without taking any such objection against respondent No. 6, a fact indicating that the reason for the objection lay upon personal grounds. Though respondent No. 1 does not himself belong to the scheduled tribe, he has identified himself in the course of the hearing of the Election Petition with the contention of respondent No. 5 with the result that respondents Nos. 1 and 5 made a common cause to resist this Election Petition. The Tribunal, therefore, thinks that respondents Nos. 1 and 5 must be ordered to pay Rs. 200 as costs of the petition.

ORDER

It is hereby declared that the Election for the Nawapur-Sakri Constituency to the Legislative Assembly of the Bombay State held on 7th January 1952 is wholly void Respondents Nos. 1 and 5 shall pay to the petitioner Rs. 200 by way of costs and all the respondents shall bear their own.

(Sd.) B. D. NADKARNI, *Chairman*,
(Sd.) J. R. NAZARETH, *Member*.
(Sd.) M. G. CHITALE, *Member*.

The 27th January 1953.

[No. 19/25/52-Elec III.]

S.R.O. 281.—WHEREAS the election of Shri Sitaram Hirachand Birla of Erandol, East Khandesh District, as a member of the Legislative Assembly of Bombay from the Erandol constituency of that Assembly, has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Yograjsing Shankarsing Parihar of Dharangaon, East Khandesh District, Bombay State;

AND WHEREAS, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

ELECTION PETITION NO. 72 OF 1952

Ex. 54

CORAM:

Shri B. D. Nadkarni, B.A. (Hons.), LL.B.—*Chairman.*

Shri J. R. Nazareth, M.A., LL.B.,

Shri M. G. Chitale, B.A., LL.B.—*Members of the Election Tribunal.*

In the matter of the Representation of the People Act, 1951

AND

In the matter of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951.

AND

In the matter of the Election Petition presented thereunder by Shri Yograjsing Shankarsing Parihar.

Yograjsing Shankarsing Parihar.—*Petitioner.*

Versus

1. Sitaram Hirachand Birla.
2. Sahebrao Nathoo Patil.
3. Gansing Bhogo Patil.
4. Khanderao Mahadeo Pharate.
5. Dhanaji Raoji Patil.
6. B. R. Dengwekar.—*Respondents.*

Shri D. H. Pardiwala with Shri S. C. Manudhane for the Petitioner.

Shri H. V. Pataskar with Shri S. G. Manudhane for Respondent No. 1.

Shri U. L. Patil for Respondent No. 2.

Respondent No. 3 absent. Respondents Nos. 4 and 5 present in person.

Shri V. S. Sawant, Asstt. District Government Pleader, E.K., Jalgaon for Respondent No. 6.

Shri V. G. Mudholkar, District Government Pleader, for the State under instructions from the Advocate General.

JUDGMENT

This is an election petition presented to the Election Commission and sent to this Tribunal for hearing. The petitioner Yograjsing Parihar was one of the candidates who offered himself for election along with respondents Nos. 1 to 5 for the seat in the Bombay Legislative Assembly representing the Erandol Taluka Constituency. Nominations were filed up to 23rd November 1951 not only by the petitioner and respondents 1 to 5 but also by another candidate Shri T. C. Patil who withdrew from the contest before the date fixed for withdrawal. After scrutiny of the nomination papers held on 27th and 28th of November 1951, such nominations as were in order were announced on the 28th and the election took place on 7th January 1952. The counting of votes took place on 12th January 1952 after which it was declared that respondent No. 1 was duly elected. His election was gazetted on 19th January 1952 and the results of election for all the seats for the State Assembly were published in the Bombay Government Gazette on 6th March 1952. On 13th March 1952 notice as required by Rule 113 was issued and published in the Bombay Government Gazette.

2. This petition bearing the date 25th March 1952 was sent by the petitioner by post, as is permissible, to the Election Commission and it reached the Commission on 27th March 1952, within 14 days as required by the Act. In the petition as originally drafted and sent, one of the candidates duly nominated *viz.* Shri T. C. Patil was omitted to be impleaded. The petition which prayed for setting aside the election of respondent No. 1 was based *inter alia* upon the ground that respondent No. 1 was not qualified to offer himself for election and that the result of election has been materially affected by reason of corrupt and illegal practices. The petition was accompanied by a list of corrupt practices as required by section 83, but details therein appeared to the Commission to be lacking. So also, the Commission thought that the verification below the petition as well as that below the list was not in proper form and that a proper type of receipt in respect of the deposit had not been attached. Therefore by a letter dated 22nd April 1952 the Commission wrote to the petitioner pointing out the defects in the petition and called upon him to show cause within 15 days from the date of the letter why the petition should not be dismissed under section 85 of the Representation of the

People Act, 1951, for non-compliance with the provisions of sections 83 and 117 of the said Act. In reply, the petitioner by his letter dated 30th April 1952 mentioned several reasons as to how some defects had crept in the petition and prayed that they may be condoned As an accompaniment to this letter he sent a verification to the petition marked Ex. 1D and a detailed list as required by section 83 verified in proper form marked Ex. 1E, and prayed that further action may be taken under section 86 of the Act. After receipt of these, the Commission without proceeding to exercise the power vested in it under section 85 appointed this Tribunal and has forwarded the original petition together with the subsequent letter and its accompaniments to be dealt with according to law.

3. On receipt of the petition, notices were issued to all the parties whose names appeared in the original petition. Except respondent No. 3 Gansing Bhogo Patil, all have filed their written statements putting forward certain contentions. At this stage we are concerned mainly with those contentions put forward by respondent No. 1 which affect the question of the tenability of the petition. They are *inter alia* (1) that the petition is not duly constituted inasmuch as Shri T. C. Patil who was a duly nominated candidate is not a party to the petition as required by section 82, (2) that the petition as well as the list is not duly verified as required by section 83, (3) that the petition is not accompanied by such a list as is contemplated by section 83 since it lacks in necessary particulars, and (4) that the petition is not accompanied by a receipt for the deposit in proper form. It has also been contended that the subsequent attempt on the part of the petitioner to amend the defects pointed out by the Commission cannot cure the same as the attempt is made beyond the time prescribed under Rule 119 framed under the Act. Regarding the allegations of corrupt and illegal practices, the respondent categorically denied the same. After these contentions were put forward, the petitioner gave an application before this Tribunal which is Ex. 28 giving several reasons as to how through inadvertence the name of Shri T. C. Patil happened to be omitted, and prayed that he may be added as a party respondent. A notice of this application, Ex. 28, was served on all those who were already in the petition as parties and as the Tribunal felt that such a notice would also be necessary to Shri T. C. Patil before any orders are passed on Ex. 28, a notice to show cause why he should not be impleaded was served on him. Though called out, he is not present. There is no appearance on his behalf or any contentions put forward against the application, Ex. 28.

4. Out of the issues framed with regard to the contentions put forward by the parties, the following five issues bearing on the question of tenability of the petition were treated and heard as preliminary issues at the request of the parties on both sides. They are:

(1) Whether T. C. Patil was a necessary party to this proceeding and whether in view of the omission to implead him the whole petition is bad?

(2) Whether the amended application Ex 28 can be allowed having regard to the fact that it is given beyond the period prescribed in section 81 of the Representation of the People Act? Are the reasons given for the omission valid? If so, can it cure the defects so as to make the application maintainable?

(3) Whether the Tribunal is not competent to consider about the legality of the action of the Election Commission in getting the defects corrected?

(4) If it is, whether having regard to the provisions of section 85, the Election Commission was competent to get the defects about verification and details mentioned in sections 81 and 83 cured?

(5) If the Tribunal is competent to consider the question of proper constitution of the petition, whether there is proper, legal and valid verification of the petition and the list containing details?

The findings of the Tribunal are:

(1) In the affirmative on the first part and in the negative on the second.

(2) In the affirmative on the first part, finding unnecessary on the second, and in the affirmative on the third.

(3) It is not competent.

(4) Does not survive.

(5) As the Tribunal is competent to consider the question of constitution of the petition, the finding is in the affirmative in view of the amendments allowed.

5. The preliminary issues set forth above relate in all to four defects as urged on behalf of respondent No. 1, which are, (i) absence of Shri T. C. Patil as a party

to the original petition, (ii) absence of certain particulars in the original list accompanying the petition, (iii) absence of verification in a proper form as prescribed in Order VI rule 15, Civil Procedure Code, both at the foot of the petition as well as the list, and (iv) absence of a Chalan in proper form in token of deposit of Rs. 1000 under section 117 of the Act. At the outset, Shri Pataskar, the learned Advocate on behalf of the respondent No. 1, conceded that the contention regarding the last mentioned defect is not pressed by him in view of the fact that proper form of Chalan was not available in the Treasury. Therefore, the Tribunal is called upon to consider the contentions relating only to the first three defects. In this connection, it may be pointed out that the petitioner has contended that defects Nos. (ii) and (iii) as alleged by the respondent did not at all exist and if they did exist, they are cured by his letter dated 30th April 1952 together with the two accompaniments *viz.*, the verification and a new list as required by section 83 duly verified. Regarding the absence of a party, the petitioner has filed before the Tribunal the application, Ex. 28, but which happens to be beyond the period of 14 days prescribed under Rule 119. It would be convenient in the opinion of the Tribunal to consider each of these contentions separately.

6. Turning to section 82 of the Representation of the People Act, it will be seen that there is an obligation on the petitioner to join as respondents to his petition all the candidates who were "duly nominated" at the election other than himself if he was so nominated. In this case, it is conceded that Shri T. C. Patil was duly nominated and also that he had withdrawn before the date fixed for withdrawal of candidature by Section 37 of the Act. The learned advocate for the petitioner has, however, contended that the absence of Shri Patil as a party does not either affect the constitution of the petition or violate the provisions of section 82 because he was no longer a candidate contesting the actual election in view of his withdrawal and that the expression "duly nominated" in section 82 is synonymous with the expression "validly nominated" as contemplated by section 38. Turning to section 38 it will be seen that after the date fixed for withdrawal the Returning Officer is required to prepare and publish a list of "valid nominations" which suggests that the names of those who have withdrawn their candidature need not find place in such a list and relying on this section it is argued that since Shri Patil has withdrawn before the date of publication of the list of valid nominations as required by section 38, he was no longer a validly nominated candidate and therefore was not a necessary party as per section 82. The Tribunal is unable to accept the contention of the petitioner that the expression "duly nominated" is synonymous with the expression "validly nominated". On reference to the Rules framed under the Act, namely, The Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, as modified up to the 1st November 1951, it will be seen from Rule 2 (which deals with Interpretation) that in clause (f) "validly nominated candidate" is defined to mean a candidate who has been duly nominated and has not withdrawn his candidature in the manner and within the time specified in sub-section (1) of section 37. This definition makes a clear distinction between a duly nominated and a validly nominated candidate, because a validly nominated candidate is one who has not withdrawn his nomination within the time allowed by the Act and whose name finds place in the list published under section 38. It is significant to note that in the same definition two expressions to connote two different types of candidates have been used. Unless it was the intention of the framers of the Rules that these two types should be regarded as distinct, it was not at all necessary to use two different expressions in the same rule. But the learned advocate for the petitioner has urged, firstly that the Act has not defined "duly nominated candidate" or "validly nominated candidate" separately, so as to bring out any distinction between the two and that even if the definition contained in the rule does suggest that, the rule cannot override the provisions of the Act which make no such distinction. It is also urged that while the Act is the product of the Legislature, the Rules have been framed by the Central Government in consultation with the Election Commission and therefore anything that is said in the Rules when not supported by the Act cannot override the provisions of the Act. The Tribunal is unable to accept the contention of the petitioner that the Act itself does not make a distinction between a "duly nominated candidate" and a "validly nominated candidate" and that the terms are synonymous. This will be clear from Part V, Chapter I, sections 30 to 38 of the Act which refer to the various stages after going through which what are described as valid nominations emerge. It is significant to note that except in the heading of section 33 up to section 38 all the sections use the expression "duly nominated" as distinguished from "validly nominated" and it is only section 38 that uses the expression "valid nominations". What appears to the Tribunal is that "duly nominated" is a wider group of candidates who satisfy the requirements specified in section 33 whereas "validly nominated candidates" are only those who remain after withdrawals if any and may be a smaller group. But it was argued for the petitioner that the use of the phrase

"valid nomination" in the heading of section 33 suggests that the expression is synonymous with "duly nominated" because that section deals with the requirements of "duly nominated candidate". The Tribunal is of the view that where the provisions of the section are themselves clear and unambiguous, it would not be permissible to refer to the heading for the purpose of interpretation of the section in view of Ramkrishna v. Bapurao 40 Bom. L.R. 390. On this point a reference to section 52 of the Act would also be useful as it brings out the distinction between a "duly nominated candidate" and a "validly nominated candidate", for, in consequence of the death of a candidate before poll, if the poll is to be countermanded, opportunity is given not merely to the validly nominated candidates but also to the duly nominated candidates who may have withdrawn, to file fresh nominations; the second proviso to section 52 makes this position clear The Tribunal is, therefore, unable to accept the contention of the petitioner that the expression "duly nominated" is synonymous with "validly nominated" and if section 82 of the Act requires that a duly nominated candidate shall be joined as a party, the fact that Shri Patil has withdrawn will not help the petitioner in contending that he is not a necessary party.

7. The next question that arises is whether the non-joinder of Shri T. C. Patil to the petition as a respondent is fatal to the tenability of the application in view of the terms of section 82 of the Act. Shri Pataskar on behalf of respondent No. 1 has urged that the word "shall" used in section 82 is mandatory in nature, that absence of a necessary party is fatal to the petition, and that the defect cannot be cured by a subsequent application, particularly when it is submitted after the period of 14 days prescribed for the presentation of petitions under Rule 119. For the petitioner it is urged that the word "shall" used in section 82 is not mandatory but only directory and reliance is placed on Chapter XII, Section 3, at page 372 of Maxwell's Interpretation of Statutes, 9th Edition, 1946, where the learned author has observed that unless a consequence is mentioned for the failure to do what is directed to be done, the word "shall" will not have mandatory effect but only directory effect. And the petitioner points out that in the whole of the Act there is no provision for dismissal of a petition for failure to comply with the provisions of section 82. The Tribunal is of the view that since no consequence is provided for in the Act, the question has to be decided on the analogy of Order XXXIV rule 1 of the Civil Procedure Code in view of section 90 sub-section (2) of the Representation of the People Act. Though, in effect, the same wording is used in Order XXXIV rule 1 using the word "shall" it has been held in several rulings that the defect need not necessarily be fatal and parties can be added subsequently subject to certain conditions (for example *vide* Shivubal Kom Rajaram v. Shiddheshwar Martand I.L.R. 45 Bom. 1009). The Tribunal, therefore, does not agree with the contention on behalf of respondent No. 1 that the defect is fatal to the petition incapable of being cured by amendment though it would be necessary to consider whether the amendment should be allowed in this case or not, which will be done later.

8. Before going to the question whether the amendment application, Ex. 28, should be allowed or not, it would be convenient to consider the other defects that have been urged on behalf of respondent No. 1 *viz.*, absence of proper verification both in respect of the petition as well as the list, and absence of particulars in the list as originally filed. In this connection, it must be stated that it is not that there is no verification or that here is no list giving particulars accompanying the petition as required by section 83. The petition as well as the list in this case as originally presented to the Election Commission bear endorsements of verification, though in general terms. The defects urged in regard to the endorsements of verification are that they do not specify by reference to the numbered paragraphs of the petition what the petitioner verifies of his own knowledge and what he verifies upon information received and believed to be true. It is also pointed out that the list as filed is vague with regard to the particulars of the alleged corrupt or illegal practices. With regard to the verification, the Tribunal thinks that though there is no compliance with the letter of Order VI rule 15, there is substantial compliance with the provision. In regard to the list, though some of the instances mentioned in it appear to be vague, at least 1 or 2 of them give sufficient particulars and while considering whether there is compliance of section 83, even if the particulars of one instance are sufficiently stated, the tenability of the petition cannot be successfully challanged on that ground. For instance, there is a specific allegation in para 8(e) of the list accompanying the original petition that respondent No. 1 himself assaulted a Home Guard by name Thuss who refused to allow respondent No. 1 to commit illegal practices. Similarly, in paras. 8(h) and 8(i) there are sufficient particulars of the alleged illegal practices which fairly serve to inform the adverse party of the substance of the allegations. Even assuming that the particulars given are no sufficient, section 83(3) gives the Tribunal power to allow amendment of the particulars upon such terms as may be necessary for the purpose of ensuring a fair and effectual trial of the petition.

9 Even if the verification is not in compliance with the strict letter of Order VI rule 15 of the Civil Procedure Code, what was sought by the petitioner by his letter to the Commission was nothing more than an amplification of the verification already made. Shri Pataskar on behalf of respondent No. 1 referred the Tribunal to a decision in Election Petition No. 83 of 1952 concerning Mehsana East Constituency and has produced a copy of the Gazette of India, Extraordinary, Part I Section 1, dated Friday, October 10, 1952, containing a report of the decision of that Tribunal, adopting it as his argument in support of his contention. But a perusal of that decision would indicate that it was a case of absence of verification at the foot of the list and consequently the Tribunal held that there was non-compliance of section 83(2) of the Act. But the petition before us is not a case of absence of verification both in regard to the petition or the list.

10. Holding as we do that the defect about the absence of party is not fatal in view of the analogous provisions of the Civil Procedure Code in Order XXXIV rule 1 and that this is not a case of total absence of verification but at the most what is sought by amendment is amplification of the verification, the next questions before the Tribunal are, firstly whether the Tribunal has power to grant amendments, and secondly whether in the circumstances as disclosed, the amendments sought should be allowed. In regard to the latter question it may become necessary to consider whether if the amendment is to be allowed, it will mean any prejudice to any party so as to deprive that party of any substantive right that may have accrued to that party. Dealing with the first point, namely, whether the Tribunal has powers to grant the amendment, rival contentions have been put forward on behalf of the petitioner and respondent No. 1 in regard to the construction of the action of the Election Commission in writing the letter pointing out the defects and the powers of the Tribunal in regard to the clarification submitted by the petitioner. It is contended on behalf of respondent No. 1 that the Election Commission had no jurisdiction to call for further or better particulars; it is also contended that if the Election Commission took the view that the petition and the list did not comply with he provisions of section 83, the Election Commission had no option but to dismiss the petition under section 85, and, therefore, there is no valid petition before the Tribunal for a decision. As against this, it is contended on behalf of the petitioner that the Election Commission is a parent body from which this Tribunal derives its powers, that the Election Commission not having dismissed the petition must be deemed to have granted the amendment and having, on the other hand, appointed the Tribunal, it is not open to this Tribunal to dismiss the petition on the ground that it does not comply with the provisions of section 83. The Tribunal considers that both the arguments carried to their logical conclusion appear inconsistent in parts. If it is the petitioner's case that the Tribunal is a creature of the Election Commission and is bound by whatever has been done or not done by the Election Commission, it would not be correct further to say that the Tribunal has unlimited powers under section 90 of the Act. In a like manner, if it is the contention of respondent No. 1 that the Tribunal is an independent body not deriving its powers from the Election Commission, it would not be correct to say that the Tribunal's powers are restricted to section 92 and therefore it would not be open to the Tribunal to grant the amendment. In fact, in order to get over this inconsistency it is urged on behalf of respondent No. 1 that though the Tribunal is an independent body, its powers are restricted to the stage of trial of the petition and that the Tribunal cannot exercise powers which may relate to the steps including those of amendment etc. prior to the stage of hearing. And, in support of this argument reliance is placed by Shri Pataskar on section 92 which refers to the powers of the Tribunal. It has been argued that the Tribunal can exercise only those powers under the Civil Procedure Code which are enumerated in section 92 and not any other powers given to a Court under the Civil Procedure Code. And it is further pointed out relying upon section 90(4) that it is only in respect of the contingencies mentioned therein that the Tribunal can act contrary to what has been done by the Election Commission defining thereby only those contingencies outside the provisions of section 92 where the Tribunal could dismiss the petition. The Tribunal is unable to accept this contention on behalf of respondent No. 1 nor is it prepared to accept the contention on behalf of the petitioner that the Tribunal derives its powers from the Election Commission in the matter of deciding the petitions. In fact, the Tribunal thinks that this question does not properly arise for decision in this particular case because the arguments giving rise to this aspect of the case are based upon certain assumptions on either side, none of which, in the opinion of the Tribunal, would be correct as will be seen presently.

11. From the fact that the Commission wrote the letter dated 22nd April 1952 pointing out the defects and desisting from rejecting the petition under section 85, it cannot be assumed as is done for the petitioner that the Election Commission

afforded an opportunity to the petitioner to rectify the petition and consequently granted the amendments, for, the last paragraph of the letter dated April 22, 1952, itself makes it clear that the letter is to be read as without prejudice to the provisions of law applicable to the case. So also, the contention on behalf of respondent No. 1 based upon section 92 of the Representation of the People Act that the powers of the Tribunal are restricted only to a particular sphere *viz.* the stage of hearing, is not correct. A reference to the provisions of the Civil Procedure Code, particularly to section 30, would indicate that the enumeration mentioned in section 92 of the Act is not intended to restrict the scope of the powers of the Tribunal. In fact, the whole of the Civil Procedure Code, relates to the hearing of a suit right from the earliest stage to its conclusion; yet section 30 of the Code enumerates similar powers as are mentioned in section 92 of the Representation of the People Act. In fact, a reference to section 90(2) of the Act would show that in some respects the powers conferred upon the Tribunal are wider than those conferred upon the Court under the Civil Procedure Code in the matter of recording of the evidence and refusal to examine witnesses as the provisos indicate. It may be further observed that even if it is assumed that the Tribunal's powers are restricted to the stage of trial or hearing, whatever it may be called, apart from the fact that the expression "Trial" has not been defined either in the Act or in the Civil Procedure Code, the right to ask for amendments and power to grant them are not restricted to any particular time, for, amendments can be asked for and granted at any stage, even in appeal, under the Civil Procedure Code. In this view, it is really unnecessary to decide the question whether the Tribunal derives its powers from the Election Commission, because in the view of the Tribunal it has wide powers to grant amendments, and they can be exercised by it at any stage of the proceeding.

12. However, since a long argument has been addressed on this question, the Tribunal feels it desirable to express its view on the point. An Election Tribunal is a creature of the Statute and not of the Election Commission although the administrative act of appointment is entrusted to the Commission. But the powers and duties of the Tribunal are prescribed by the Statute itself as will appear from sections 86, 90, 92, 98, 99, 105, 109, 116 and 118 to 120 of the Act. It is pertinent to point out that finality is attached to the decision of a Tribunal there being no appeal provided for. Secondly, even though under section 85 power is vested in the Commission to dismiss the petition under certain circumstances, where the Commission omits to pass such order, power is given to the Tribunal under section 90(4) to dismiss a petition on the very grounds. Thirdly, while the grounds upon which the Commission can dismiss a petition are limited to those mentioned in sections 81, 83 and 117, the grounds on which the Tribunal can do so on several other grounds also as mentioned in the Act. In fact, section 82 is omitted from the grounds upon which the Commission can make an order of dismissal. The Tribunal, is, therefore, of the opinion that the powers which the Tribunal can exercise under the Civil Procedure Code are not at all restricted in scope except where there are specific provisions to the contrary in the Representation of the People Act, and, therefore, is fully competent either to grant or reject the amendments subject to the established principles in regard to amendments.

13. This brings us to the question whether the amendments prayed for should be allowed. It may be repeated here that so far as the verification and the particulars of the list are concerned, the amendment sought is not of a substantial nature but only of a formal character, more or less in the nature of amplification of the original verification and the list. So far as Ex. 28 seeking to add a party is concerned, unless some prejudice is shown as likely to result by reason of the amendment either to any of the parties already on record or to the party sought to be added, there is no reason why the amendment should not be allowed on the general principles. Shri T. C. Patil is a candidate who had withdrawn his candidature and had not contested the election. By reason of his absence or presence, having regard to the grounds on which the petition is based, no prejudice is shown as likely to result to respondent No 1, for, the main grounds on which the petition is based are of corrupt and illegal practices. It has been urged by Shri Pataskar on behalf of respondent No.1 that Ex. 28 has been presented beyond the period prescribed in Rule 119. But if Shri T. C. Patil is not shown to have acquired any substantive rights by reason of the failure of the petitioner to implead him within the period prescribed there will be no question of depriving him of any such rights. On the other hand, if by any chance the petitioner were to succeed and a fresh election were to take place, Shri Patil would get an apportunity to his advantage to contest it. Order 1 rule 10 of the Civil Procedure Code permits addition of parties who ought to have been parties. In the Representation of the People Act no consequence for the non-compliance of Section 82 has been prescribed. Section 90 (2) of the Act makes all the provisions of the Civil Procedure Code applicable except where

specific provision is made in the Representation of the People Act. Where, therefore, the nature of the petition is not altered and no prejudice is shown to result to any of the parties to the petition including the party that is sought to be added, amendment of the pleading ought to be allowed in the opinion of the Tribunal in order to lead to effective adjudication on merits. The Tribunal, therefore, considers that the documents accompanying the letter dated 20th April 1952 of the petitioner to the Election Commission should be treated as further clarification or submission of better particulars as contemplated by Section 83 (3) and the amendment sought by Ex. 28 should be granted and the hearing of the petition should proceed in regard to the remaining issues. The petitioner should pay Rs. 75 as costs to respondent No. 1 irrespective of the result before the next hearing as a condition precedent to the making of the amendments.

(Sd.) B. D. NADKARNI, *Chairman.*

The 30th October, 1952.

(Sd.) M. G. CHITALE, *Member.*

(Sd.) J. R. NAZARETH, *Member.*

Further judgement (per B. D. Nadkarni, Chairman).

14. In view of the findings above, and in view of the decision of the High Court in Special Civil Application No. 2017 of 1952 the issues that remain for decision out of those framed at Ex. 43 are:

(6) Whether there is improper acceptance of the nomination of Respondent No. 1 on the ground that he was a member of the Bombay Legislative Assembly and Secretary of the District Rural Board? Are these offices of profit under Government or disqualifications for being a candidate?

(7) Is it proved by the Petitioner that the results of the Election had been materially affected in consequence of tempering with of the ballot boxes after the Election as alleged in para. 6 of the petition?

(8) Whether the Petitioner proves that votes were obtained from the six persons mentioned in the list, dated 30-4-1952 by exercise of the acts alleged therein? Do they amount to coercion or undue influence within the meaning of Section 123 (2) ?

(9) Whether it is proved by the Petitioner that Respondent No.1 and the persons named in para. B of the list made a systematic appeal to the voters to vote on the grounds of caste so as to influence the result of voting?

(10) Whether the Petitioner proves that the Respondent No. 1 and his two workers Kabre and Chaudhary caused publication of statements and writings mentioned in para. C of the list, dated 30-4-1952 believing them to be false or knowing them to be false which were calculated reasonably to prejudice the prospects of the Petitioner's Election as specified in Section 123 (5) ?

(11) Is it proved by the petitioner that the workers named in paras. D(1) and E of the list, dated 30-4-1952 were administered threats and coercion to prevent them from working for the Petitioner and to vote for him and that his worker Dube, named in the purshis, Ex. 45, was assaulted as alleged in para. D(2) of the said list by the worker or at the instance of Respondent No.1 in order to prejudice the applicant's prospects of Election?

(12) Whether wearing of any badges by a candidate is prohibited so as to amount to corrupt or illegal practice under the Election Laws? If so, is it proved by the Petitioner that Respondent No.1 were such badges within the prohibited area and displayed or exhibited wall paintings as mentioned in G(2) of the list?

(13) Whether the Petitioner proves that Respondent No.1 incurred unauthorised expenses by opening hotels for supplying tea and other drinks and hiring conveyances as mentioned respectively in paras. F and H in the list, dated 30-4-1952?

(14) Whether it is proved that the Car mentioned in H of the list was used for purpose of carrying voters to and from Election Booth?

(15) Is it open now to the Petitioner to name the workers mentioned in para. G of the list? If so, does he prove that the said workers and canvassers had canvassed within the prohibited area so as to influence the result of the Election in favour of Respondent No.1?

(16) What order?

The findings of the Tribunal on these issues are:

(6) In the negative on both parts.

(7)

(8)

(9) In the negative.

(10)

(11)

(12) In the negative on the first part so as to affect the Election. The finding on the rest of the issue is not necessary.

(13) In the negative.

(14) Voters were found in the car, but it is not proved that they were there with the knowledge or connivance of Respondent No. 1 or his agent.

(15) Does not survive; but in the negative.

(16) As below.

15. At the outset it may be stated that except those contentions which have given rise to issue Nos. 6, 7, 12 and 14, the contentions giving rise to some of the other issues were neither attempted to be proved by evidence nor were they seriously pressed in the course of the arguments. It would be convenient to make a passing reference to these contentions before taking up the main contentions on which arguments have been advanced.

16. The allegations giving rise to issue Nos. 8 and 9 are that six Bhils named in para. (a) of the list, Ex.1-E, were prevailed upon by coercion and undue influence to vote for Respondent No. 1 and that similar threats were administered to three Musalmans mentioned in para. (e) of the list. It is alleged that Respondent No. 1 and his workers and agents visited several villages, called meetings of the different communities such as Bhils and Musalmans, that they gave them threats of different types, to the Bhils that the Criminal Tribes Act would be applied to them in case they did not vote for Respondent No. 1, and to the Musalmans that their ration cards would be cancelled and they would have to go to Pakistan, and thus several voters mentioned in the list were influenced by interfering with free exercise of the electoral right within the meaning of Section 123(2) of the Representation of the People Act. The witnesses examined on this point on behalf of the Petitioner are, Ramsing Bhil Ex. 169, Shankar Zaga Ex. 135, and Shaikh Nura Shaikh Baba Ex. 186. The Tribunal feels it extremely unsafe to rely upon the evidence of these witnesses for more than one reason. From the evidence of Ramsing, Ex. 169, it would appear that though he professes to have respect and regard for the Petitioner for whom he would have voted, even though after Respondent No. 1 and his workers had given him threats, when the Petitioner's workers including a pleader had come to his village he had not mentioned to them of what Respondent No. 1's workers had told him. That the witness is tutored is apparent from the fact that he uses the English word "chapter" in relation to proceedings meaning proceedings under Chapter VIII of the Criminal Procedure Code, even though the witness does not know anything about it. More or less is to the same effect the evidence of Shankar Zaga, Ex. 135, and it is clear from his evidence also that though he does not know what is meant by the English expressions "Chapter" and "summary", he has used these words in the course of his deposition. Shaikh Nura, Ex. 186, has been brought forward to say that appeal was made on the ground of religion besides giving threats. From his evidence also it would appear that though the Petitioner for whom he had great regard and his workers had visited his village after the workers of Respondent No. 1 had gone, he never mentioned anything about the threats or the appeal made on religious grounds to the Petitioner or his workers. In fact, there is no evidence produced to show whether at all any of these witnesses had actually voted and it would not indeed be difficult to obtain a few witnesses of the type to make such allegations as would fall within one or the other of the sections of the Representation of the People Act on which an election could be challenged. It might be observed that, except commending the evidence of these witnesses for the consideration of the Tribunal, no comment was made either on behalf of the Petitioner or on behalf of the Respondents. The Tribunal finds it extremely hazardous to place any reliance upon such type of witnesses.

17 The allegation giving rise to issue No. 10 as made in para. (c) of the list is that Respondent No. 1 and his workers, Kabre and Chaudhary, in the course of propaganda meetings held in Erandol and Dharangaon between 28th December and 6th January made allegations which were derogatory to the Petitioner, namely, that he was a Mawali or Gunda associating with Gundas, that he had

engaged pleaders by paying large sums of money to convass for him and, therefore, people should not vote for the Petitioner. While the second allegation about engaging the pleaders on payment of large sums of money does not happen to be proved by the best available evidence, and even if proved would not amount to any corrupt or illegal practice, the evidence regarding the first allegation cannot be called reliable at all. Shri P. G. Joshi, a senior pleader of Erandol, has been called and examined to say that he had organized a meeting on behalf of the Petitioner to refute the allegation made earlier in public meetings that he and two other pleaders, *viz.* Pharate and Patil, who are Respondents Nos. 4 and 5, had been engaged by the Patitioner by payment of heavy sums of money. Shri Joshi, who appears to be connected with Hindu Mahasabha and who makes no secret of his active opposition to the Congress, admits, however, that these allegations had not been made within his hearing but had been conveyed to him by Respondents Nos. 4 and 5. Though Respondents Nos. 4 and 5 were present in court as parties, they have not stepped into the witness box to say that any allegations had been made of the type as stated by Shri P. G. Joshi. Even assuming that such allegations had been made, since the Representation of the People Act or the Rules framed thereunder do not prohibit employment of canvassers for remuneration, provided the expenditure is mentioned in the returns, even if the allegation made by Shri P. G. Joshi is ture, the allegation would not contravene any of the provisions of the Election Laws. While Respondents Nos. 4 and 5 themselves have not stepped into the witness box to say whether they themselves had heard any of the allegations made or whether they conveyed them to Shri Joshi, the Petitioner has contented himself by examining his own Polling Agent Dandavate, who, in his anxiety to support the Petitioner, has been more enthusiastic than the Petitioner himself, when he stated that unauthorised badges were worn not merely by the workers and the agents, but were even given to the voters who went and gave them to the Polling staff, which is not the allegation even of the Petitioner himself. In fact, the evidence of this witness would show that though siding with the Petitioner, he was attending the meetings held on behalf of Respondent No. 1 just to assess the impressions created on the minds of the voters by reason of the propaganda. Yet the witness is not able to name a single person who expressed about such impressions. The witness in his evidence does not give a very creditable account of himself. There is, therefore, no substance in the contentions giving rise to issue No. 10

18. The contentions giving rise to issue No. 11 are that Respondent No. 1's workers, mainly witness Baburao Kabre, asked the workers for the Petitioner not to work on pain of loss of employment, that a Home Guard who objected to illegal practices was assaulted, and that similarly Dattatraya Dube was also assaulted and beaten. All these allegations are denied and there is no evidence, except of Dattatraya Dube, for the petitioner to support any of these allegations. Though in the list, para (d), the name of the Home Guard alleged to have been assaulted is mentioned, he has not been called. One Ramlal, a worker of respondent No. 1, is alleged to have assaulted the petitioner's workers at Erandol but no name of that worker happens to have been mentioned except that of Dattatray Dube. In fact, Dattatray Dube is the only witness examined on behalf of the petitioner on this point. But the Tribunal is unable to accept his evidence as sufficient to show that the respondent or any of his agents had anything to do with the assault on the witness if it really took place. Dattatray Dube, Ex. 170, is a school-boy of 18 professing to talk about political affiliations more than he should do at his age, and trying to exaggerate things. He states, probably not being conscious of his own limitations as a school-boy, that he was supporting a Socialist candidate in the Election, that out of disappointment he began to support the petitioner though the petitioner himself or any one on his behalf did not engage him as a worker, that of his own accord he went near the polling booth on 7th January 1952, and that when he objected to the workers of respondent No. 1 going with badges and bringing the voters in carts, he was assaulted by Ramnarain Kabre who is not the same as Ramkrishna Kabre. When the witness was so enthusiastic about the petitioner, he is not able to say whether any of the petitioner's workers were present at the booth where he had gone and who were those workers. He has a complaint to make not only about the workers of respondent No. 1, but even the Police and the Home Guards who did not heed his protest that the respondent's voters were being brought in carts. No doubt, it appears that on the same day he had approached the Police Sub Inspector with a complaint that he had been assaulted by Ramnarain Kabre. But looking to the fact that this young boy had neither been engaged as a worker nor as an agent, and on his own admission had gone roundabout the polling booths, it is not possible to know whether his misguided enthusiasm had invited some sort of chastisement from others which is now attempted to be turned to good use. In the absence of better evidence about the assault on the witness by any of the

workers of respondent No. 1, it is difficult to accept the evidence of the school-boy who appears to be more enthusiastic on matters other than his own proper occupation. Regarding the allegation that respondent No. 1 had opened hotels for supplying tea, drinks, etc. and had incurred unauthorized expenditure, the petitioner has made no attempt to lead any evidence and hence the findings on issue Nos. 11 and 13.

19. Dealing next with the main points on which argument has been addressed before the Tribunal, it has been contended on behalf of the petitioner, and which contention has given rise to issue No. 6, that under Article 191 of the Constitution of India respondent No. 1 was disqualified from being chosen as a member of the Legislative Assembly by reason of the fact that he was a sitting member of the old Legislative Assembly receiving a monthly salary of Rs. 150, that he was the Secretary of the Rural Development Board, that he was a member of certain sub-committees for which he was receiving remuneration and, therefore, he was holding office of profit under the Government at the date of the Election. While respondent No. 1 has admitted that he was holding all these capacities, he has denied that he was receiving any remuneration except as a member of the Legislative Assembly. The petitioner has brought forward no evidence to show that he was receiving any remuneration as the Secretary of the Rural Development Board or for his work on different sub-committees; and the argument has been confined before the Tribunal with reference to the admitted fact that as a member of the old Legislative Assembly respondent No. 1 was receiving a salary of Rs. 150, besides daily allowance and travelling allowance during and at the place of the session. On behalf of respondent No 1 it is contended that his position as a member of the Legislature is not an office, that what he received was not profit, and that it cannot be said that respondent No. 1 held any office of profit under Government. The Tribunal is not prepared to accept the contention on behalf of respondent No. 1 that the membership of the outgoing Assembly held by the Respondent No. 1 at the date of the Election was not an "office" or that what he received was not "profit", but the Tribunal is of the view that the position held by respondent No. 1 cannot be deemed to be an office *under* Government which was intended to disqualify a person either from being chosen or for continuing as a member of the Legislature. The expression "office" does not appear to have been defined anywhere and, therefore, the connotation of the word has to be understood with reference to the dictionary meaning. The learned Advocate on behalf of the petitioner has referred to the meaning of the expression given in Murray's Dictionary, Vol. VII, Oxford and Webster's Dictionaries as well as Law Lexicon by Aiyar, page 901. Reference has also been made to Law Reports 1920, 3 K. B. 266 at page 273 and 1942 Appeal Cases 561 at page 564. On a perusal of all these references the Tribunal is of the opinion that office means a position or place to which certain duties are attached more or less of a public character, and that it is a sort of a permanent position held by successive incumbents. An office may be with or without remuneration and may or may not be under Government. It is "a right to exercise a public or private employment" or to hold a position which has certain duties attached to it. The connotation being very general, it would not be correct to say as urged on behalf of respondent No. 1 that the membership of the Legislative Assembly is not an office.

20. It is admitted by respondent No. 1 that at the date of the last Election, nay nomination, he was receiving from the Government Rs. 150 per month as a member of the Legislative Assembly. Yet, it is contended on his behalf that it cannot be regarded as profit and, therefore, he was not holding an office of profit. Here again, the word "profit" does not appear to have been defined anywhere and the learned Advocate on behalf of the petitioner has relied upon the dictionary meaning of the word, and contends that the word "profit" is wide so as to include salary. It has been pointed out that Bombay Act III of 1937 which is called. "The Bombay Legislature. Members' Salaries and Allowances Act" mentions in section 3(1) the payment to be made to a member as a salary of Rs. 150 per month. He has further referred to the Commentary on the Constitution of India by D. D. Basu, Second Edition, 1952, at page 346, which suggests that salary is included in "profit" and, therefore, an office which has a salary attached to it is an office of profit. It is also pointed out in this connection that Article 195 of the Constitution refers to salaries and allowances of the members of the Legislatures. It is thus contended that a salary received by the incumbent of an office is included within the expression "profit". Having regard to the meaning of the expression "profit" the Tribunal thinks that profit is a wider term including "salary" and, therefore, salary attached to the office of a member of the Legislature is profit.

21. The next important question is, whether the office of a Legislator can be deemed to be under the Government, for, unless that office can be deemed to be an office of profit *under* Government, there would be no disqualification under Article 191 of the Constitution. A reference to Articles 191 to 193 and 195 would provide a definite answer to this question. Article 191 refers to an office of profit under the Government of India or the Government of any State. The expression "State Government" has been defined in the Indian General Clauses Act, section 3(60) and definition (b) therein is:

> "as respects anything done or to be done after the commencement of the Constitution, shall mean, in a Part A State, Governor, in a Part B State, the Rajpramukh, and in a Part C State, the Central Government."

This indicates that the term "Government" as used in Article 191 of the Constitution was intended to be synonymous in Part A States with the Governor, and, therefore, office of profit under Government means one under the Governor. In fact, it will be seen that while in the case of all Government servants the powers are exercised by the Governor, in the case of the members of the Legislature the disciplinary powers are exercised not by the Governor, but by the Speaker. It is obvious, therefore, that a member of a Legislature is subordinate only to the Speaker and the House. That remuneration received as an elected member of the Legislative Assmbly could not have been deemed to be a disqualification under Article 191 is very clear if Article 193 is read. It will appear from Article 193 that a penalty is prescribed for continuing to sit in the Assembly where a member sits and votes without making oath or when he incurs disqualification as mentioned in Article 191. If under Article 195 a member has to receive a salary, and if that salary were to be regarded as "profit while holding office under the Government", it would mean a disqualification under Article 191. If such were the meaning to be attached to the salary, it means that immediately after Election as soon as a member receives salary as provided in Article 195, he would become disqualified under Article 191 to sit and vote so as to incur penalties mentioned in Article 193. It could never have been intended by the Constitution that a member elected to the Legislature should be disqualified immediately on Election as soon as he receives salary. The inevitable inference, therefore, is that the disqualification mentioned in Article 191 was not intended to refer to salary received by an elected member of the Legislature and, therefore, such a member receiving salary is not one who holds office of profit under Government. Obviously, therefore, respondent No. 1 was not holding office of profit under Government as contemplated by Article 191 so as to be disqualified from being chosen at the date of the last Election.

22. The next important ground on which the election of respondent No 1 is challenged is a major corrupt practice mentioned in section 123(6) upon the allegation that either respondent No. 1 or his agents, or, in the alternative at the connivance of one or the other, conveyances such as bullock carts and a motor car bearing No. BMW 7227 had been procured for the conveyance of voters. While regarding the use of bullock carts there is no reliable evidence, there is positive evidence to show that in the motor car belonging to Ramkrishna Mojiram Kabre known commonly as Baburao Kabre, who was both a Polling and a Counting Agent of respondent No. 1, there were found sitting seven Muslim women after they had exercised their vote. The main evidence regarding the bullock carts is that of Dattatray Dube, Ex. 170, the enthusiastic boy whose evidence has been dealt with above. His allegation that at the Brandol High School booth he had seen voters coming in bullock carts 2 or 3 times does not carry conviction because the Presiding Officer of that booth had not been apprised of the fact. In fact, the Presiding Officer also has not been called. It would appear from his evidence that if not a Policeman, at least there was a Home Guard at the limit of 300 ft. from the polling booth, who would not have remained quite without taking objection. In fact, if the workers of the petitioner, who had not been slow to approach the Police on that day, had really seen the voters being brought in bullock carts, they would not have failed to bring that fact to the notice of the Presiding Officer or the Police who were posted for the purpose of preventing infringement of Election Rules. In fact, Baliram, Ex. 188, who later on took objection about the motor car does not appear to have taken any objection to the use of any bullock carts which he would not have omitted to do if really bullock carts had been used for the conveyance of voters. None of the witnesses are able to mention the names of persons who were driving the carts or any of the voters who came in those carts. It is, therefore, difficult to believe that any voters had been

brought to any of the polling booths in carts arranged for or procured by respondent No. 1 or any of his workers.

23. Regarding the motor car, however, there is definite and positive evidence to show that seven female voters were seen and found in the motor car belonging to Baburao Kabre bearing No. BMW 7227. The main evidence on this point is that of Baliram, Ex. 188, corroborated in some part by that of the Sub-Inspector of Police, Papat, Ex. 164, and the panch Kisan Hari, Ex. 180. The allegations made by witness Baliram in this connection are briefly these. Baliram was the Polling Agent of the petitioner at the polling booth in the Erandol High School. At about 3 or 4 P.M. about seven Muslim women came to the polling booth sitting in a country cart. Baburao Kabre, the Polling Agent of respondent No. 1, was at that time near the place where the cart stopped. He asked some girls standing nearby to conduct the voters to the polling booth, and after the voters returned having cast their votes, a girl volunteer told other volunteers to conduct those women and make them stand behind the wall of the Taluka Office which is just across the road. The curiosity of Baliram was aroused. He, therefore, went on the road to see what happened next. When the women were waiting behind the wall of the Taluka Office, the motor car belonging to Baburao Kabre appeared on the scene and the seven female voters took their seats in the car. Thereupon the workers of the petitioner and the Socialist candidate surrounded the car in order to prevent it from moving and in the meanwhile Baliram went to the Police Station which is housed in the Taluka Office compound and complained to the Sub-Inspector that an offence has been committed under section 133 of the Representation of the People Act. The Sub-Inspector immediately came to the vehicle which had been stopped, and even though the offence was of a non-cognizable nature made a panchanama of the vehicle with the assistance of a Musalman and other panchas after asking the women who they were and where they were going. The women gave their names, and on their fingers were found marks of indelible ink to show that they had cast their votes. From the point that Baliram had lodged a complaint which led to the making of the panchanama by the Sub-Inspector, the evidence of Baliram finds corroboration from that of the Sub-Inspector and the panch. But regarding the earlier part, namely, that the voters had come in a country cart, that Baliram had watched them and that he saw them sitting later on in the car, there is no independent corroboration, and the testimony of Baliram stands alone. On behalf of respondent No. 1 the denial of these allegations is couched in general terms being to the effect that no car had been procured or used for conveyance of voters, and that neither the respondent nor his Polling Agents had connived at procurement or use of any conveyance. But it seems, the facts that seven women were found sitting in the car, that the car belonged to Baburao Kabre and that the seven women had already exercised their vote are undeniable in view of the documentary evidence to support the oral evidence. Before referring to the documentary evidence it is necessary to observe that the Tribunal has been deprived of an opportunity to ascertain the true facts by disappearance of the original papers containing the complaint made by Baliram, the panchanama made by the Sub-Inspector and the statements of several witnesses which he had recorded after undertaking an investigation, even though the offence was non-cognizable, after obtaining necessary permission from a Magistrate. It will appear from Ex. 161 that on 28th January 1952 the petitioner applied to the District Superintendent of Police, East Khandesh, for copies of all this record. He sent a telegram on 15th February 1952 because the copies had not been supplied, and on 27th February 1952 he sent a reminder, Ex. 163. It seems that in the meanwhile the papers had been sent by the Police to the Sub-Divisional Magistrate. The evidence of Tukaram Bagul, Ex. 158, a clerk in the office of the District Magistrate, Jalgaon, shows that the papers had been received from the D.S.P. on 7th January 1952, that they had been sent subsequently to the office of the Sub-Divisional Magistrate, and that on 5th March 1952 on the application of the petitioner only a copy of the panchanama regarding the motor car was supplied to him rejecting his prayer for copies of the statements of wintesses. From the evidence of Narayan Patil, Ex. 157, a clerk in the office of the Sub-Divisional Magistrate, First Class, Amalner, shows that after the papers were once again received in the Sub-Divisional Magistrate's office on 31st March 1952, the entire bundle disappeared, that a search conducted in the office failed to trace them, and that action is being taken against the clerk who was in charge of the same. In the course of these proceedings summons had been taken out to different officers, the District Superintendent of Police, the District Magistrate as well as the Sub-Divisional Magistrate and a reply has been received that the papers are not traced. As loss of the papers has been satisfactorily established, the certified copy of the panchanama supplied to the petitioner has been admitted on record, and is at Ex. 181. The fact of the making of the panchanama has been proved by the evidence of the panch Kisan Hari, Ex. 180. Much argument has been addressed and several inferences sought to be drawn from this important fact of

the loss of papers and these will be referred to presently. But the Tribunal has no doubt in view of the panchanama and other independent evidence that seven Muslim voters who had cast their votes were found sitting in the car at the time of the panchanama, of which Ex. 181 is a copy.

24. Referring to the contents of the panchanama, Ex. 181, with the evidence of the panch as well as the Sub-Inspector, on behalf of respondent No. 1 it is suggested that both the Sub-Inspector as well as the panch for reasons best known to themselves have tried to improve upon the story in order to support the petitioner. It is pointed out in this connection that while the panchanama mentions that Muslim panch Taimursha, who is not examined in the case, had satisfied himself about the voting marks on the fingers of the seven women, and though there is no mention that the other panchas or the Sub-Inspector had seen those marks, both the Sub-Inspector and the panch have evolved a story in the course of the hearing that they too had seen the marks. It is also pointed out that though the offence was of a non-cognizable nature which the Sub-Inspector was not called upon to investigate, contrary to the usual practice followed, the Sub-Inspector not only made a panchanama, but started investigation though on the next day he obtained the necessary permission from the Magistrate for conducting the investigation. The Tribunal thinks it unnecessary to comment on these allegations in view of the unimpeachable evidence furnished by other documents to show that the seven women that were found in the car had exercised their vote, though there is no material produced to show in whose favour. The original electoral rolls used at the time of the polling have been got produced in this case which contain ticks and marks made by the Polling Officers in compliance of the instructions, showing conclusively that the seven women voters had gone to the Polling booth and had received the ballot papers. The question as to the candidate for whom they had voted would have been material only if it was necessary for the purpose of this corrupt practice to establish that the result of the Election has been materially effected. But for a major corrupt practice mentioned in section 123(6) it is not necessary to prove that the results of the Election have been materially affected. The Tribunal, therefore, entertains no doubt about the fact that the seven Muslim voters found seated in the car bearing No. BMW 7227 belonging to Baburao Kabre, who was an Agent of respondent No. 1, had cast their votes.

25. But the more important question bearing on section 123(6) is whether the car at the time the women voters got in was procured by respondent No. 1 or his Agent Baburao Kabre or with their connivance for the purpose of taking the voters back to their houses, for, unless these facts are established, the mere fact that the voters were found in that car will not itself be sufficient to find respondent No. 1 guilty of a major corrupt practice. Upon this point, the only evidence on behalf of the petitioner is that of Baliram at whose instance the panchanama was made, and of the panch Kisan Hari, Ex. 180, supported by the circumstances that the car belonged to the agent of respondent No. 1 and that the papers had disappeared after the filing of these election petitions for which the petitioner wants to ascribe blame to respondent No. 1. On behalf of respondent No. 1 it is strongly urged that respondent No. 1 could have nothing to do with the disappearance of papers because the papers could not have disclosed, according to him, his connection or that of his Polling Agent, with the car. While the Tribunal strongly feels that it does no credit to a Government office that official papers should disappear from it so easily, the fact remains that an opportunity is denied to the Tribunal to go into greater detail by referring to the record regarding this alleged major corrupt practice though in view of the evidence it is not possible for the Tribunal to fix the responsibility for this deplorable incident on either party. The suggestion on behalf of the petitioner is that as respondent No. 1 belongs to a party in power, it was not difficult for him to manipulate disappearance of papers which would have gone very much against him. As against this, it is urged on behalf of respondent No. 1 that the papers could not have disclosed any facts damaging to respondent No. 1 because the Sub-Inspector who had undertaken the investigation with all enthusiasm had himself reported to the Sub-Divisional Magistrate for a C Summary which means no offence was disclosed though procurement of a vehicle is an offence under section 133 of the Representation of the People Act. The farthest limit to which the Tribunal could go in considering this matter is that there is less probability of the petitioner being responsible for the timely loss of papers, particularly in view of the fact that he had applied for certified copies of the papers including the statements of persons examined on the spot, which, however, were refused to him. The petitioner has thus solely to rest upon the evidence of Baliram and the panch to establish one of the most important ingredients required to be satisfied under section 123(6) of the Representation of the People Act.

26. It has already been stated above that there is no corroboration to the evidence of Baliram that when the female voters first came to the booth in a country cart, Baburao Kabre had directed a female volunteer or volunteers to conduct

them to the booth and thereafter at the instance of one of the girl volunteers the voters had been conducted to a place to await the arrival of the car. But the petitioner wants to connect Baburao Kabre with this incident by the allegation to be found in Baliram's deposition that Baburao Kabre came to the Police Station immediately after the panchanama was made, requested Baliram to drop the proceedings owning that he had committed a mistake. The fact that the car belonged to Baburao Kabre is not in dispute and it will be discussed presently to find out what inferences are possible therefrom. But, if the allegation of Baliram that Baburao Kabre made a statement in the nature of a confession is true, there can be no doubt that the connivance of the Agent of respondent No. 1 would be established. Here it may be observed that respondent No. 1 was not present on the occasion and his evidence shows that he was moving about on that day at different polling booths throughout his Constituency. Therefore, there is no allegation, much less proof, about the active or passive connivance of respondent No. 1 in connection with the car. The brunt of allegations, therefore, is directed against the conduct of Baburao Kabre in making what may be called a confession to Baliram. No doubt, Kisan Hari also states in his evidence that after the panchanama was made Baburao Kabre arrived at the spot and had a talk with Baliram. Notwithstanding the evidence of these two witnesses, the Tribunal feels it extremely unsafe to accept their allegations in view of the contradictions and improbabilities to be dealt with presently.

27. According to Baliram, Baburao Kabre made the above confession taking him aside to a distance of 10 to 12 feet. The witness states that he felt that he could stop further proceedings if only the matter had not gone out of his hands to the Police. It is difficult to believe that a person who had gone to this extent would have thought of dropping the proceedings only at the request of Baburao. But the witness further states that though the Sub-Inspector was not far away, he did not mention anything to the Sub-Inspector as to what Baburao had mentioned to him. Whether the attitude of Baliram was one favourable to Baburao or otherwise, the normal conduct of the witness should have been to mention the fact to the Sub-Inspector. And, if the witness did not say anything to the Sub-Inspector, the obvious inference is that the story of Baburao's approach is false. The evidence of the panch Kisan Hari, Ex. 180, who was examined earlier, contradicts that of Baliram on this point in material particulars. According to this witness he was close to Baliram when Baburao made the request to him. He does not say that Baburao took Baliram aside. In fact, the witness affirms that when Baburao made the request to Baliram, he did so in the very presence of the Sub-Inspector and two constables. But, unfortunately for both the witnesses, the Sub-Inspector himself does not speak even a word about the coming of Baburao Kabre to the spot, or of his having made any request to Baliram in his presence or otherwise. Baburao Kabre is a pleader and probably would not have been so foolish after a panchanama had been made in the presence of 500 to 700 people to make such a confession to Baliram either aside or in the presence of the Sub-Inspector. What appears to the Tribunal is that because the panch had made allegations about the coming of Baburao, Baliram who was examined later on *i.e.* on the following day thought of improving upon the evidence of the panch in an attempt to reconcile it with that of the Police Sub-Inspector. Baburao has been examined in the case and he has affirmed that throughout that day he had never come to the polling booth at the High School but was for the whole time at the polling booth of the Marathi School. The evidence of the Sub-Inspector shows that the distance between the two polling booths is about 5 furlongs. In view of the contradictions just referred to and particularly omission on the part of the Sub-Inspector to mention even a word about the presence of Baburao at the time of or after the panchanama concerning the car the Tribunal feels it extremely unsafe to accept the discrepant evidence of Baliram and the panch.

28. But the learned Advocate for the petitioner has urged that the fact that the car belongs to Baburao Kabre is in itself a very strong circumstance suggesting his connivance, if not that of respondent No. 1, in the use and procurement of the same for the purpose of conveying voters. While at first sight this circumstance appeals strongly, in view of several other circumstances the inference of connivance is rendered very weak if not negligible. In this connection, it has been strongly urged on behalf of the petitioner that the pleading of respondent No. 1 is general in terms and does not try to explain the indisputable fact of the presence of voters in the car even though in the list every detail concerning it had been given. So long as the car belonged not to respondent No. 1 but Baburao, it was for Baburao Kabre to have explained in what circumstances the voters were in it. But Baburao not being a party to these proceedings except as a witness, there was no occasion for him to have given any pleading. And, if respondent No. 1 was absent at the polling station, or even at Erandol, on the date of the polling as he was moving about, his emphatic denial of knowledge about

the use of any car and his part in connection with it cannot be deemed to be falling short of the requirements of Order VIII rule 4 of the Civil Procedure Code. Baburao Kabre has explained in his deposition, which was the only opportunity when he could explain, that he drives his own car, that Umar who was found at the wheel in the car at the time of the panchanama was not his servant, but of the Motor Union in which he was a share-holder, that owing to the absence of any garage the car used to be parked near the motor stand and that Umar had been asked by him to take the car every day only for the purpose of washing. It is suggested that on that day while Umar was taking the car for the purpose of washing in the direction of Sayad Wada where he lives, he might, of his own accord, have taken the female voters of his community who also lived in Sayadwada with the idea of leaving them there without the knowledge of Baburao Kabre. On the other hand, it is urged on behalf of the petitioner that Umar has not been examined to explain the circumstances in which he took the voters and that the above explanation has not been offered by respondent No. 1 in his pleading. It has already been pointed out that it was for Baburao Kabre more than for respondent No. 1 to explain the circumstances, and failure to examine Umar does not affect the case as his evidence would have been necessary only by way of rebuttal if the petitioner had established satisfactorily the connivance of Baburao. There are a number of circumstances in the case which can negative the inference of connivance of Baburao in the matter of using the car to take the female voters.

29. Though a large number of witnesses is examined in this case, the use of the car has been referred to only on this solitary occasion. On the other hand, the evidence is directed to show that bullock carts were being used though none of the witnesses has stated that he identified the carts, the drivers or the voters. Had there been some evidence to show that the car had been frequently used on that day for bringing the voters and taking them back, the solitary fact that the voters had got into the car at the wayside could possibly have led to the inference that the said conveyance had been procured on that day for the purpose of conveying the voters with the active or passive connivance of respondent No. 1 or any of his Agents. The Tribunal, therefore, holds that on the evidence, circumstances and probabilities of the case, the major corrupt practice under section 123(6) alleged is not established.

30. It has been alleged that respondent No. 1 and his workers have also committed illegal practices, in that, his Agents and workers entered within the limits of 300 feet from the polling booth wearing unauthorised badges of the type of Ex. 151 which bore the words "Vote for the Congress", and that at Dharangaon at four places *viz.* Subhash Darwaja, the Post Office, the wall of a latrine and a hair-cutting saloon near the Revenue Chavdi, all of which were within a distance of hundred yards from the respective polling booths there were wall paintings asking vote for the Congress. As regards the use of the badges by the workers of respondent No. 1 for some time during the polling at Erandol, and the existence of wall paintings as alleged by the petitioner, the Tribunal feels no doubt in view of unimpeachable evidence. On the application of the petitioner, Shri Chandratreya, Ex. 174, the Mamlatdar of Erandol, made four panchanamas, Exs. 176 to 179, on 30th January 1952 about the wall paintings at the four respective places mentioned above which asked vote for the Congress. The distances mentioned in the panchanamas are all within hundred yards. No doubt, the panchanamas happened to have been made three weeks after the Election took place. But from that fact it is not possible to conclude that the paintings were subsequently made by any one interested against respondent No. 1 for the purpose of creating evidence, because the paintings themselves gave evidence of obliteration by reason of time. In this connection, it has been urged that the Mamlatdar on his own evidence had given instructions to the village officers to obliterate all placards and paintings within the limit of hundred yards from polling stations, that the village officers had reported to him compliance of these instructions and that he himself had not noticed these paintings on the day preceding the Election. But it would appear from the evidence of the Mamlatdar that on the preceding day as he had to visit several places, he could not examine each place roundabout every polling booth and, therefore, omission on his part to notice these paintings need not necessarily show that they did not exist. As regards the use of badges, though the petitioner's witnesses Ramdas Ex. 182, who was Polling Agent at Dharangaon, Dattatray Ex. 184, who was Polling Agent in the booth at the Girls' School at Erandol, and Baliram Patil, who was Polling Agent at the Erandol High School, have made an attempt to suggest that the wearing of the offending badges had continued during the major part of the day, the evidence of Kumari Gadgil, Ex. 166, who was the Presiding Officer at the Marathi School at Erandol shows that though at 8 A.M. when the polling was started she saw badges of the type of Ex. 151 worn by the workers of respondent No. 1, the wearing of these was

discontinued within half an hour when she received a complaint which synchronized with the arrival of Shri Keskar, the Personal Assistant to the Collector, who told the Agents not to wear such badges. None of the other Presiding Officers at the other polling booths has been called and examined to say till what time the badges were continued to be worn. On the other hand, there are indications in the evidence to show that on the instructions of Shri Keskar, who was going round for inspection at the booths, either the badges were discontinued to be worn or the offending portion asking for vote printed on the badges was cut off. The Tribunal, therefore, does not accept the allegation that the badges were continued to be worn for the major part of the day at all the booths. Even if it be assumed that such badges were worn for a longer period than is apparent from the evidence and that there were wall paintings existing, the Tribunal thinks that as it does not amount to a major corrupt practice, it can serve as a ground for setting aside the Election under section 100(2) (a) only on proof by the petitioner that the election of respondent No. 1 has been procured or induced or that the result of the Election has been materially affected by such illegal practice. Not a single witness has been examined to say that his vote was influenced by the wall paintings or use of the above-said badges.

31. In this connection, some argument was advanced before the Tribunal on the question whether use of the badges and the wall paintings mentioned above amounts to an illegal practice within the meaning of section 125. But it will appear from the definition of an "illegal practice" contained in section 2(f) of the Representation of the People Act that "illegal practice" means only any of the practices specified in section 125, and in view of this definition, as they are not covered by section 125, their use cannot amount to an illegal practice. But it was contended that the expression "illegal practices" being wide in its nature, any act which is punishable in law must be included within that expression, and as section 130 makes canvassing for votes or exhibiting of any notice or sign punishable, this must be regarded as an illegal practice. If any acts other than those mentioned in section 125 were intended to be treated as illegal practices, there is no reason why the definition given in section 2(f) should have been restricted to the acts specified in section 125 alone. It must be observed in this connection that where the Legislature intends that an Election could be set aside only on specific grounds in specific circumstances, it would not be open to the Tribunal to expand the definitions given in the Act so as to include those not mentioned when the definition is rigid. Though an act may be an offence under section 130, it need not necessarily amount to an illegal practice to serve as a ground for setting aside the Election. The Tribunal, therefore, finds that such use of badges and wall paintings as is proved cannot be a ground for declaring the election of the returned candidate to be void under section 100(2) (a) of the Act.

32. One other ground which has given rise to issue No. 7 remains to be dealt with. It has been alleged by the petitioner that the ballot boxes had been tampered with during the period between the close of the polling on 7th January 1952 and the commencement of the counting on 12th January 1952. It is alleged that under the rules the ballot boxes were required to be secured in gunny bags and sealed but that at the time when the counting commenced, the gunny bags were missing and the petitioner and his Agents saw only the ballot boxes. But the evidence that is led on behalf of the petitioner would show that gunny bags had been supplied to the Presiding Officers only for the purpose of packing the ballot boxes to prevent the seals on the ballot boxes from getting damaged. No doubt, it appears from the evidence of Kumari Vimal Gadgil, Ex. 166, that after the polling was closed, after sealing the slit on each ballot box she had put them in a gunny bag along with other articles of stationery for being conveyed to the place of safe custody. She has also stated that she had no instructions to seal the gunny bag, and, therefore, she had not sealed them. The evidence of the Assistant Returning Officer, Shri Chandratreya, Ex. 174, clearly shows that the gunny bags were meant only for the purpose of preventing the seals on the ballot boxes from getting damaged and that after receipt of the ballot boxes he got all of them unpacked from the gunny bags and arranged them in a strong room according to each candidate. The evidence of Kumari Gadgil as well as Shri Chandratreya shows that on all ballot boxes seals had been made in the presence of either the candidates or their Polling Agents and that at the time of the counting either the candidates or their Agents had inspected the seals on the ballot boxes, and that the petitioner had also found the seals of the boxes intact. In fact, the petitioner has admitted in his deposition that the seals on all the ballot boxes concerning the Election which he contested were all found intact. A ballot box of the type used was called for from the Collector and the petitioner made no attempt to show that with the seal on the slit intact the ballot box could be tampered in any manner. It may be observed that it would appear from the very admissions of the petitioner that he made no complaint in writing at the time of the counting about the

absence of the gunny bags so as to indicate tampering, much less about the condition of the seals on the ballot boxes. Therefore, there appears to be no substance in the contention giving rise to issue No. 7.

33. In view of the findings recorded above it follows that no grounds have been established which would justify setting aside of the Election by declaring it to be void, and, therefore, the petition must fail. Notwithstanding this result, the Tribunal is of the view that this is not a case in which there was no cause for complaint in regard to some of the acts committed by the Agents and workers of respondent No. 1, for, the Tribunal has found as a fact that voters were found in a car while returning though connivance of the petitioner or his Agent is not established, and that there was use of wall paintings and of unauthorised badges, be it even for a short time, contrary to the Election Laws though the effect of these upon the voters is not established. In view of these circumstances, it appears to the Tribunal that though the petition fails, there should be no order as to the costs of the petition.

ORDER

In view of the findings above, the petition fails and is, therefore, dismissed. In the circumstances mentioned above there will be no order as to the costs of the petition, and this order shall not affect the order of costs already made at the hearing of the preliminary issues.

(Sd.) B. D. NADKARNI, *Chairman.*

(Sd.) J. R. NAZARETH, *Member.*

(Sd) M. G. CHITALE, *Member.*

The 28th January 1953.

[No. 19/72/52-Elec.III.]

S.R.O. 282.—WHEREAS the election of Shri Ram Charan Singh, a member of the Legislative Assembly of the State of Bihar from the Kurtha constituency of that Assembly has been called in question by an Election Petition (Election Petition No. 113 of 1952 before the Election Commission) duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951) by Shri Shah Umair Saheb S/o Shah Md. Ishfaque Hussain, Village Makhdumpur Kabir (Arwal), P. S Arwal, District Gaya;

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of Section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its order on the said Election Petition.

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

IN THE COURT OF THE ELECTION TRIBUNAL, HAZARIBAGH

PRESENT:

Mr. S. B. Sengupta— *Chairman.*

Mr. Gobind Saran—*Member.*

Mr. Nirmal Krishna Ghose—*Member.*

(In the matter of election case to the Bihar Legislative Assembly, 1952 from Kurtha Constituency, District Gaya, State of Bihar).

Shah Umair Saheb—*Petitioner.*

Versus

1. Ramcharan Singh.
2. Parasnath Sharma
3. Raja Ram Singh.
4. Raghuraj Singh—*Respondents.*

JUDGMENT OF MR. S. B. SENGUPTA, CHAIRMAN AND MR. N. K. GHOSE MEMBER.

This is an election petition filed by Shah Umair Saheb for declaration of the election of Shree Ram Charan Singh (respondent No. 1) to the Bihar Legislative Assembly from Kurtha Constituency as void and also for a declaration that the petitioner has been duly elected. The petition is opposed by respondent No. 1, Shree Ramcharan Singh, on various grounds. One of the grounds is that Shree

Sia Saran Singh, Shree Ram Prakash Mahton and Shree Balmiki Mahton, whose nominations were not accepted by the Returning Officer under section 36 and who withdrew their candidatures thereafter under section 37 of the Representation of the People Act, 1951 have not been made respondents in the election petition, which is therefore not maintainable and shall be dismissed for their non-joinder as respondents. In this connection a preliminary issue has been framed as follows:—

Issue No. 2.—Is the petition liable to be dismissed on the ground of non-joinder of parties?

The petitioner has also filed a petition for amendment of the election petition by adding the aforesaid candidates as respondents. We are therefore also to consider if this petition shall be allowed. It is important to note that if these points be decided against the petitioner it will not be necessary to enter into and decide other issues, framed in this case.

It is undisputed that the aforesaid candidates' nominations were accepted by the Returning Officer after scrutiny under section 36 and the candidates thereafter withdrew their candidatures under section 37 of the Act and their names were not published in the list of "*valid nominations*" under section 38 of the Act.

The points which arise in this connection are covered by section 82 of the Act. Section 82 runs as follows:—

> "A petitioner *shall* join as respondents to his petition *all* the candidates who were *duly nominated* at the election other than himself if he was so nominated".

In the application of section 82, stress is to be laid on the words *shall, all* and *duly nominated,* used in this section.

Three points arise for determination in this connection.

Point No. 1.—The first point is—whether a candidate whose nomination has been accepted under section 36, but who withdraws his candidature thereafter under section 37 and whose name does not therefore appear in the list of *valid nominations* published under section 38, comes within the term "*duly nominated*" used in section 82.

It is contended on behalf of the petitioner that the term "*duly nominated*" includes only those candidates whose names have been published in the list of *valid nominations* under section 38 and does not include those candidates whose nominations have been accepted under section 36, but who have withdrawn their candidatures under section 37.

We do not agree to this contention. In the Act a distinction has been made between the term "*duly nominated*" and the term "valid nomination" (or "*validly nominated*") used in section 38. The term "*duly nominated*" is a wider term than the term "*validly nominated*". The term "*duly nominated*" means all candidates whose nominations have been accepted by the Returning Officer after scrutiny, under section 36; it therefore includes

(1) all nominated candidates who withdraw their candidatures under section 37 and

(2) all nominated candidates who do not withdraw their candidatures under section 37 and whose names are published in the list of *valid nominations* under section 38. The distinction between the two terms will be clear, if one carefully goes through the relevant sections relating to nomination, *i.e.*, sections 33, 34, 36, 37 and 38. Sections 33, 34 and 36 relate to nomination up to the stage when the nomination is accepted after scrutiny, under section 36, and not thereafter. The term "*duly nominated*" has been used thrice in section 33 thus:—

1. In sub-section (3): ".....no candidate shall be deemed to be *duly nominated* unless such declaration is, or all such declarations are, delivered along with the nomination paper."
2. In the second proviso of this sub-section: ".....no candidate shall be deemed to be *duly nominated* for the seat so reserved unless the nomination paper is accompanied by a declaration.....".
3. In the third proviso of this sub-section: "..... ... such person shall not be deemed to be *duly nominated* as a candidate unless his nomination paper is accompanied by a certificate .....".

This term has also been used in section 34, which runs thus:—

> "Deposits:—(1) A candidate shall not be deemed to be *duly nominated* unless he deposits .....".

The term has again been used in section 36, sub-section (3), thus:—

> "..... *if the candidate has been duly nominated by means of another* nomination paper in respect of which no irregularity has been committed."

The use of the term "*duly nominated*" in sections 33, 34 and 36 (quoted above) clearly goes to prove that the term includes all those candidates whose nominations have been accepted after scrutiny under section 36, irrespective of the question whether such nominated candidates withdraw their candidatures thereafter, under section 37.

The distinction between the two terms, "*duly nominated*" and "*validly nominated*", and their meanings have been clearly brought out and emphasised in the definition of the term "*validly nominated candidate*" in Rule 2 relating to INTERPRETATIONS in the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951. Rule 2 clause (f) runs thus:—

> "Validly nominated candidate" means a candidate who has been *duly nominated and has not withdrawn his candidature* in the manner and within the time specified in sub-section (1) of section 37 or in that sub-section read with sub-section (4) of section 39, as the case may be.

Section 38 also brings out the distinction between the two terms very clearly. Section 38 runs thus:—

> "Publication of nominations.—The Returning Officer shall, immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (1) of section 37, prepare and publish a list of *valid nominations* in such manner as may be prescribed."

Section 38 relates to nomination after the acceptance of the nomination paper under section 36 and after withdrawal of the candidature under section 37. But in section 38, the term "duly nominated" has not been used; the term used is "*valid nomination*".

There cannot be any manner of doubt therefore that a *validly nomiated* candidate, as distinguished from a duly nominated candidate, means only those duly nominated candidates who have not withdrawn their candidatures and whose names have been published in the list of valid nominations under section 38. But a *duly nominated* candidate means all those candidates whose nominations have been accepted after scrutiny under section 36 and therefore includes (1) those duly nominated candidates who withdraw their candidatures thereafter under section 37 and (2) also those duly nominated candidates who do not withdraw their candidatures thereafter under section 37.

It is significant to note that in section 82, the words used are "*all* the candidates who were *duly nominated* at the election" and the words "*and* have not withdrawn their candidature" have been deliberately omitted from section 82. The term "validly nominated" has also not been used in section 82.

In connection with one election petition on this point, it has been argued before us that the words, "*and has not withdrawn his* candidature" used in the definition of a validly nominated candidate in Rule 2(f) of the Representation of the People Rules, 1951 (quoted above), are redundant and form a tautologous expression and that '*validly nominated*' and '*duly nominated*' are interchangeable terms and have the same meaning and include only those candidates who have not withdrawn their candidatures under section 37 and whose names have been published in the list of *valid nominations* under section 38; *i.e.* only those candidates who actually "go to the polls". In support of this argument our attention is drawn to sections 52 and 53 of the Act. This argument is clearly wrong. As stated above, the Act has made a clear distinction between the two terms *duly nominated* and *validly nominated*. The use of the words "and has not *withdrawn his candidature*" in the definition of a *validly nominated* candidate in Rule 2(f) has been made with deliberate care; the words are not redundant. This will also be clear from sections 52 and 53 to which our attention has been drawn. Section 52 relates to "Death of candidate before poll", *i.e.* the section comes into operation "if a candidate who has been *duly nominated* under this Act dies *after* the date fixed for the scrutiny of nominations". Such deaths may occur either

(1) before the expiry of the period within which candidatures may be withdrawn under section 37, or

(2) after the expiry of such period.

If death occurs before the expiry of the period within which candidatures may be withdrawn, the candidate may die, though after the acceptance of his nomination

after scrutiny under section 36, but before he could exercise his option to withdraw or not to withdraw under section 37. Such a candidate cannot be described as one who has been duly nominated and *has not withdrawn his candidature*; he shall be described as a candidate who has been duly nominated and the words "has not withdrawn his candidature" cannot be added to it. The death of such a candidate would come under the purview of section 52. The death of a candidate contemplated in section 52 does not therefore necessarily mean the death of a candidate who had opportunity to exercise his option to withdraw under section 37 before his death and who has not withdrawn his candidature. So the expression "and has not withdrawn his candidature" has been deliberately omitted from section 52. But section 53 relates to "Procedure in contested and uncontested elections". Necessarily therefore it relates to only those candidates who have been duly nominated and *who have not withdrawn their candidatures, i.e.* to those who actually "go to the polls". Consequently the expression "who have not withdrawn their candidatures" under section 37 has been deliberately used in sction 53. The two sections 52 and 53 therefore clearly bring out the distinction between the two terms, *duly nominated* and *validly nominated* as discussed above.

Our attention has also been drawn to the earlier Rules framed under the Government of India Act, 1935, in this connection. But in the earlier Rules there does not appear to have been any distinction made between the two terms, *duly nominated* and *validly nominated*. But the distinctions between the two terms being clear in the present Act and the term used in Section 82 being *duly nominated* and not *validly nominated*, there cannot be any doubt that the term *duly nominated* used in section 82 means all candidates whose nominations were accepted after scrutiny under section 36, irrespective of the question whether such duly nominated candidates withdrew their candidatures thereafter under section 37.

We have therefore no doubt that the term *"all the candidates who were duly nominated"* used in section 82 means all the candidates whose nominations were accepted after scrutiny under section 36 and it includes those candidates also, who, after the acceptance of their nominations under section 36, withdrew their candidatures under section 37. This term also includes those candidates who, after the acceptance of their nominations after scrutiny under section 36, have not withdrawn their candidatures under section 37. It is this latter class of duly nominated candidates only, who are called *validly nominated* candidates and whose names are published in the list of *valid nominations* under section 38. According to the contention of the petitioner, the term *"duly nominated"* used in section 82 means only this latter class of nominated candidates whose list is published in the list of *valid nominations* under section 38. That is, according to his contention, the term *"duly nominated"* used in section 82 means "validly nominated". If his contention were correct, either the term *validly nominated* instead of the term *"duly nominated"* would have been used in section 82 or the words *"and have not withdrawn their candidatures"* would have been added after the words "duly nominated" in section 82 (as has been done in the definition of a *"validly nominated candidate"* in Rule 2(f) of the Representation of the People Rules, 1951, quoted above. The fact that this was not done conclusively shows that the contention of the petitioner is not correct.

Clearly therefore, a candidate whose nomination paper has been accepted after scrutiny under section 36, but who has thereafter withdrawn his candidature under section 37, comes within the term *"duly nominated"* and falls within the purview of section 82; and under section 82 such a duly nominated candidate shall be joined as a respondent in the election petition, by the petitioner. Consequently the aforesaid candidates who were duly nominated and who withdrew their candidatures thereafter under section 37, are *necessary* parties to the election petition under section 82.

Point No. 2.—The second point which then arises is whether in the absence of the aforesaid candidates being made respondents in the election petition, the election petition is maintainable or is liable to be dismissed.

From the wordings of section 82 it is clear that the section is mandatory. Here we lay special emphasis on the word "shall" used in this section. The Representation of the People Act, by its very nature, should be strictly construed. It will be noted that throughout this Act the two words *"shall"* and *"may"* have been used with great care, keeping the distinction between the meanings of the two words clearly in view. Wherever the word *"shall"* has been used, it means that the provision in which the word occurs is imperative and of a mandatory nature. Whenever the Parliament have thought fit to qualify the mandatory nature of a provision conveyed by the word *"shall"*, it has been done by adding a proviso or a sub-section, or a separate section. As for example, the provisions of sub-sections (1) and (2) of section 83 are mandatory, the word *"shall"* having been

used in both the sub-sections. But the mandatory nature of these two sub-sections have been qualified in their application, so far as the Election Tribunal is concerned, by the addition of sub-section (3) by which it has been provided that the Tribunal "*may*" allow the particulars included in the list (mentioned in sub-section (2), to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished. But there is no such proviso or sub-section or separate section to qualify the mandatory nature of section 82. Section 82 being thus mandatory, it is *incumbent* upon the petitioner to join as respondents to his petition all the candidates who were duly nominated at the election. The petitioner has no option nor discretion in the matter. From the mandatory nature of section 82 it necessarily follows that non-compliance with its provision is fatal. The provision for dismissal for non-compliance of a section of a mandatory nature is inherent in the section itself. Any separate provision for dismissal for non-compliance of a mandatory section is unnecessary and would be superfluous.

In this connection it is pointed out on behalf of the petitioner that there are provisions in the Act for dismissal of an election petition. These provisions are to be found in section 85, which applies to the Election Commission, and in section 90 sub-section (4), which applies to the Election Tribunal. Under section 85 the Election Commission *shall* dismiss an election petition if the provisions of sections 81, 83 or 117 are not complied with. Section 90 sub-section (4) lays down:—

> "Notwithstanding anything contained in section 85 the Tribunal "*may*" dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

It is further pointed out on behalf of the petitioner that in section 85 or in section 90 sub-section (4) there is no provision for dismissal of an election petition for non-compliance with the provision of section 82 and there are no other provisions in the Act for the dismissal of the election petition on that ground. It is therefore contended that section 82 has been deliberately omitted from section 85 and section 90 sub-section (4) and it follows therefrom that non-compliance with section 82, *i.e.*, the failure on the part of the petitioner to make a duly nominated candidate a respondent in the election petition, is not fatal to the maintainability of the petition which can proceed in the absence of such a candidate being made a party.

We do not agree to this contention. We agree that the omission of section 82 in section 85 and in Section 90 sub-section (4) is *deliberate*. The omission is not only deliberate, but it is *significant*. It is true that sections 83 and 117 are mandatory, the word "shall" having been used in these sections; the provision in section 81 on the point of limitation is also mandatory. But the Parliament have thought fit to qualify the mandatory nature of these sections so far as the Election Tribunal is concerned, but not so far as the Election Commission is concerned. Hence the necessity for enacting section 85 and section 90 sub-section (4). By section 90 sub-section (4) a discretion has been given to the Election Tribunal to dismiss an election petition for non-compliance with section 81, section 83 or section 117 and the word "*may*" has been used in it. But this discretion having been denied to the Election Commission, enactment of section 85 was necessary. In section 85 also the mandatory nature of section 81, so far as the question of limitation is concerned, has been qualified by giving a discretion to the Election Commission by adding a proviso that the Election Commission "*may*" in its discretion condone the delay in presenting an election petition after the expiry of the period of limitation, on sufficient cause being shown. Thus section 85 and section 90 sub-section (4) further illustrate our point of view that the word "shall" has always been used in the Act to imply the mandatory nature of the provision in which it occurs. But the deliberate omission of section 82 from section 85 and section 90 sub-section (4) clearly goes to show that the provision of this section 82 remains absolute and unqualified in its application by both the Election Commission and the Election Tribunal. The necessary conclusion therefore is that for non-compliance of the provision of section 82 *i.e.*, for the failure of the petitioner to join the aforesaid candidates as respondents the Election Commission and the Election Tribunal are not only empowered, but are bound to dismiss the election petition.

It will be further noted that under section 80,—

> "No election *shall* be called in question except by an election petition presented in accordance with the provisions of this Part."

The plain meaning of this carefully worded section 80 is that if the election petition is not presented in accordance with the provisions of Part VI, the election petition shall be dismissed. This section 80 is also mandatory and applies equally to the Election Commission and to the Election Tribunal. It not only empowers,

but it makes it *obligatory* on both the Election Commission and the Election Tribunal to dismiss the election petition. Reading the two sections 80 and 82 together we find that the Election Commission and the Election Tribunal are bound to dismiss an election petition if it fails to comply with the provision of section 82. Neither the Election Commission nor the Election Tribunal has any discretion to proceed with the election petition, if it does not comply with the provision of section 82.

There is a further provision for the dismissal of an election petition by the Election Tribunals which is to be found in section 98 of the Act. Section 98 runs thus:—

"At the conclusion of the trial of an election petition the Tribunal shall make an order:—

(a) dismissing the election petition; or

(b) declaring the election of the returned candidate to be void; or

(c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or

(d) declaring the election to be wholly void."

It has been argued on behalf of the petitioner that the word "conclusion" used in section 98 means *that* stage of the trial which comes after the recording of the evidence and that therefore under this section 98 an Election Tribunal cannot dismiss an election petition only on the ground of non-compliance with the provision of section 82 before entering into evidence on the merits of the election petition. We are unable to accept this interpretation of the word "conclusion". The term "*conclusion of the trial*" used in section 98 means the stage when the election petition can be finally disposed of and of the trial can therefore be concluded. That which concludes the trial is "the conclusion of the trial". We therefore hold that when we find that for the failure to comply with the provision of section 82 the election petition is not maintainable and for this fatal defect the election cannot be called in question under section 80, the Election Tribunal can dismiss the election petition under section 98 also, as the fatal defect occurring in the election petition concludes the trial.

There cannot be any difference of opinion on the point that the term "all the candidates who have been duly nominated" used in section 82 includes the *returned* candidate. Now let us take an extreme example. Suppose, the returned candidate has not been made a respondent in the election petition. Because there is no specific provision for dismissal of an election petition for non-compliance of section 82, as contended on behalf of the petitioner, would it follow that in the absence of the returned candidate whose election is sought to be set aside the election petition would be maintainable and could proceed? This is simply absurd. Failure to make the returned candidate a respondent in the election petition is fatal, and both the Election Commission and the Election Tribunal are bound to dismiss an election petition for such failure.

In this connection it has been argued that a returned candidate stands on a different footing from the other "*duly nominated*" candidates. It is contended that the candidates in question having withdrawn their candidatures under section 37, they ceased to have any interest in the election which took place thereafter and they expressed their unconcern to the election by the withdrawal of their candidatures; these candidates are therefore not affected at all by the trial of the election petition in their absence; and therefore in the absence of those duly nominated candidates who have withdrawn their candidatures, the election petition is maintainable and can proceed. If this contention of the petitioner were correct, then the term "*validly nominated* candidates" or the term "*duly nominated candidates who have not withdrawn their candidatures*" would have been used in section 82 instead of the term "*duly nominated*". We have already discussed this point.

It has also been argued before us in connection with some of the election petitions that where the petitioner does not claim a declaration that he himself has been duly elected, but simply calls in question the election of the returned candidate, the candidates in question who have withdrawn their candidatures and the defeated candidates also are not *necessary* parties *and* the election petition is maintainable and can proceed in their absence. If this contention of the petitioner were correct, then the Parliament must have made separate provisions regarding joinder of respondents for different kinds of election petitions praying for different kinds of reliefs. But this has not been done, as is evident from the wordings of section 82, which uniformly applies to all kinds of election petitions praying for all kinds of reliefs.

In this connection it is necessary to refer to the earlier Rule framed under the Government of India Act 1935. The Rule framed under the Government of India Act 1935, corresponding to the present section 82 of the Representation of the People Act 1951, ran thus:—

> "If a petitioner in addition to calling in question the election of a returned candidate claims a declaration that he himself has been duly elected, he shall join as respondents to his petition all other candidates who were nominated at the election."

It will be noted that in the earlier Rule, in cases where the petitioner merely called in question the election of the returned candidate, it was *not incumbent* upon him to join as respondents all the candidates who were nominated at the election. But in cases where the petitioner claimed a declaration that he himself had been duly elected, the earlier Rule and the present section 82 are exactly the same. But in the present section 82 this distinction between the two different kinds of cases has been done away with; and under the new section 82 it is *incumbent* upon the petitioner in *all cases* to join as respondents *all* the candidates, who were duly nominated at the election. This deliberate change made in section 82 on the point of joinder of respondents, by providing that in both kinds of cases the petitioner shall join as respondents *all* the candidates who were duly nominated, clearly goes to show that the intention of the Parliament in framing section 82, as it is, is to make it *obligatory* upon the petitioner to make *all* the candidates, who were duly nominated, as respondents in the election petition, whatever might be the prayer of the petitioner.

We therefore find that under section 82 all the candidates who were *"duly nominated"* have been placed on the same footing; the same principle applies to a returned candidate, a defeated candidate and any other duly nominated candidate, whatever may be the relief claimed in the election petition. In section 82, no distinction has been made amongst different classes of *"duly nominated"* candidates on the point of joinder of respondents. In view of the clear provision of section 82, the Tribunal is debarred from making any such distinction amongst the different classes of duly nominated candidates on this point. As clearly the absence of the returned candidate makes an election petition inadmissible and liable to dismissal, so the absence of any other duly nominated candidate from the election petition would make it equally inadmissible and liable to dismissal. The candidates in question being found to come within the term *"duly nominated"* and therefore within the purview of section 82, the failure on the part of the petitioner to make the aforesaid candidates as respondents in the petition is fatal to its maintainability and the election petition must therefore be dismissed. The election petition cannot proceed or be enquired into, in the absence of the candidates in question.

Point No. 3.—The third and last point which arises is whether the aforesaid candidates can be added as respondents and whether the amendment petition filed by the petitioner to that effect can be allowed.

In this connection it is pointed out on behalf of the petitioner that under section 90 any other candidate, who has not been joined as a respondent in the election petition, is entitled to be joined as such. It is therefore contended on behalf of the petitioner that the aforesaid candidates can now be joined as respondents and the amendment petition filed by the petitioner to that effect should be allowed.

We do not agree to this contention also. The petitioner cannot certainly invoke the aid of section 90 in his behalf. Under section 90, any other candidate can, of his *own motion*, join as a respondent, on certain terms and under certain conditions only. Such a candidate must apply within fourteen days from the publication of the election petition in the Official Gazette and he must also give such security for costs as the Tribunal may direct. Section 90 is obviously meant for the benefit of other candidates and not for the benefit of the petitioner. So section 90 is of no avail to the petitioner.

It has also been argued that under section 90 sub-section (2) the provisions of Civil Procedure Code as to joinder of parties shall be applicable here. Section 90 sub-section (2) runs thus:—

> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908), to the trial of suits."

This sub-section itself lays down that the provisions of the Civil Procedure Code are subject to the provisions of the Representation of the People Act 1951 and the

Electoral Rules made thereunder. It is therefore necessary to examine carefully the provisions for joinder of defendants in the Civil Procedure Code and compare them with the provision of section 82 of the Act. The provisions of the Civil Procedure Code on this point are to be found in Order 1, Rules 3, 6, 9 and 10. Order 1 Rule 3 runs thus:—

> "All persons *may* be joined as defendants against whom any right to relief..... ..... is alleged to exist....."

Order 1 Rule 6 runs thus:—

> "The plaintiff *may*, at his option join as parties to the same suit all or any of the persons severally, or jointly and severally, liable to any contract....."

From the wordings of these two Rules and specially from the use of the word *may* in them, it is clear that these Rules are not imperative and are merely directory; and a plaintiff is *not bound* to join all persons as defendants, whom he *may* do so if he chooses. The non-imperative nature of these Rules has been clearly brought out in Order 1 Rule 9, which runs thus:—

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court *may* in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it".

These three Rules are therefore clearly in conflict with the provision of section 82 of the Act we are dealing with, which lays down that it is *obligatory* upon the petitioner to join as respondents *all* the candidates who were duly nominated at the election. This conflict, by the way, further emphasises the mandatory nature of section 82. The clear provision of section 82 therefore shows that the Rules regarding joinder of defendants of the Civil Procedure Code cannot be applied to election petitions.

We should further note that if all the provisions of the Civil Procedure Code regarding amendment of pleadings were applicable to an election petition it was not necessary for the Parliament to enact sub-section (3) of section 83, which sub-section provides that the Tribunal may allow the particulars included in the "list" to be amended or order such further and better particulars in regard to any matter referred to therein, to be furnished. The enactment of the specific rule regarding amendment made in sub-section (3) of section 83 also goes to show clearly that the Rules regarding amendment of pleadings made in the Civil Procedure Code are not applicable to election petitions.

We therefore hold that under the Representation of the People Act, the Tribunal has no power to add new candidates, who were duly nominated at the election but have not been joined as respondents in the original election petition.

In connection with one election petition on this point it has been argued before us that when the Tribunal finds that, in the absence of the aforesaid candidates being made respondents in the election petition, the election petition cannot be gone into, the Tribunal shall invoke the aid of Order 1 Rule 10 of the Civil Procedure Code and of *its own motion*, add those candidates as respondents. For the reasons stated above this Rule regarding addition of parties contained in Order 1 Rule 10 of the Civil Procedure Code cannot be applied to an election petition. The discretion given to a plaintiff regarding joinder of defendants under Order 1 Rules 3 and 6 of the Civil Procedure Code makes it necessary for the framing of Order 1 Rule 10 of the Code. But section 82, by laying down that it is *incumbent* upon the petitioner to join as respondents *all* the duly nominated candidates in all cases, precludes the possibility of any scope for addition of respondents and for application of Order 1 Rule 10 of the Civil Procedure Code by the Tribunal, either at the instance of the petitioner or of its own motion. We should add in this connection that under section 92 of the Act:—

> "The Tribunal shall have the *powers* which are *vested* in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters:—
>
> (a) discovery and inspection;
>
> (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
>
> (c) compelling the production of documents;
>
> (d) examining witnesses on oath;
>
> (e) granting adjournments;

(f) reception of evidence taken on affidavit; and

(g) issuing commissions for the examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to it to be material....."

If all the provisions of the Civil Procedure Code were applicable to the trial of an election petition under section 90 sub-section (2), section 92 would be altogether superfluous. The framing of section 92 clearly shows that, apart from mere *rules of procedure,* the Civil Procedure Code *vests* a Court with certain *powers* in conducting the trial of a case and such powers given under the Code of Civil Procedure are not to be applied in the trial of election petitions except where special provision to that effect has been made in the Act. It is only with regard to matters ennumerated in section 92 of the Act that the Tribunal has been vested with powers given under the Civil Procedure Code. It will be noted that in clause (g) of section 92 it has been provided that the Tribunal may summon and examine any person *suo motu.* If the provision of Order 1 Rule 10 Civil Procedure Code empowering a Court to all parties to a suit *suo motu* were applicable to an Election Tribunal, there must have been a specific provision for it in the Act or it must have been included in section 92 of the Act. The fact that this was not done is an additional ground to show that the Tribunal has not been given any power to add any candidate as a respondent, either of its own motion or at the instance of the petitioner.

Question of limitation will also arise in connection with the petitioner's application for amendment of the election petition by adding new candidates as respondents. Would the petitioner be allowed to add new candidates as respondents at any stage? Under section 90, any other candidate has the right to apply for being a respondent within fourteen days from the publication of the election petition in the Official Gazette. There are certain time limits fixed for the presentation of election petitions before the Election Commission, under Rule 119 of the Representation of the People Rules, 1951. Those periods of limitation passed long ago. Under section 85 of the Act the Election Commission has been given power to extend the period of limitation for presentation of an election petition on sufficient cause being shown. No such power has been given to the Election Tribunal. Addition of candidates as respondents at any stage after the election petitions are referred to the Election Tribunal by the Election Commission, would therefore completely nullify the effect of the provisions made for fixing the time limits for presentation of election petitions to the Election Commission.

To clarify the question of limitation let us take the same extreme example. Suppose, the petitioner did not make the *returned* candidate a respondent in the original petition presented to the Election Commission. After the expiry of the period of limitation for presenting such election petition to the Election Commission and after the election petition is referred to the Election Tribunal, can the Election Tribunal permit the petitioner to join the returned candidate as a respondent in his petition? Certainly not. The same principle would therefore apply where the petitioner wants any other duly nominated candidate to be joined as a respondent.

It is important to note that Order 1 Rule 10 of the Civil Procedure Code for addition of parties is subject to the law of limitation, as laid down in sub-rule (5) of that Rule. It is well settled that under the Civil Procedure Code if any person is a *necessary* party to the suit, that is if the suit will not be a properly constituted one unless he is made a party, he cannot be added as a party on any ground after the period of limitation for the institution of such a suit; his addition after the period of limitation will entail the dismissal of the whole suit inasmuch as the suit becomes a properly constituted one only when he is made a party, and inasmuch as at that time the suit is barred against all. Here, under the provision of section 82 the candidates in question are necessary parties and unless they are added the election petition is not a properly constituted petition under the Act. The period of limitation for presenting the election petition having expired long ago, the candidates in question cannot be added as respondents at this stage, even if the provisions of Order 1 Rule 10 of the Code of Civil Procedure were applicable here.

On the point of limitation also, any other duly nominated candidate, who has not been joined as a respondent in the original election petition, cannot be joined as a respondent at this stage and the petitioner's application for amendment of the election petition to that effect cannot be allowed.

The aforesaid candidates cannot therefore be joined as respondents by the Tribunal, either of its own motion or at the instance of the petitioner and the petition for amendment filed to that effect must be dismissed.

The result therefore is that the non-joinder of the aforesaid candidates as respondents in the original election petition is a fatal, irremediable defect, for which the entire election petition must be dismissed. It would not therefore be necessary to enter into and decide other issues raised in the case.

(Sd.) S. B. SEN GUPTA, *Chairman.*

(Sd.) N. K. GHOSE, *Member.*

The 29th January 1953.

JUDGMENT OF DR. G. SAGAR, A MEMBER OF TRIBUNAL.

I have had the advantage to read the judgment of the Chairman and my learned brother Mr. Ghose, who is the other Member of the Tribunal. In their judgment the questions that arise for consideration in the case at this stage have been formulated.

One of the questions is founded on section 82 of the Representation of the People Act which required the petitioner to implead in the election petition all the duly nominated candidates as respondents. Therefore in the present election petition certain of the duly nominated candidates named in the judgment of my learned brothers who had withdrawn under section 37 of the Act not being impleaded as respondents the contention has been put forward that the election petition was vitally defective and that for non-compliance of section 82 of the Act in not impleading all "the duly nominated candidates" the election petition is not sustainable and must be dismissed on this account.

The second question for consideration relates to an application which the petitioner Shah Umair Shaheb filed on 6th December 1952 to add the duly nominated candidates who have been omitted as respondents and it has been urged in this behalf that the Tribunal had no powers to add new parties and that the application will also be barred by limitation and must not be allowed.

As to the first question founded on section 82 the petitioner as an explanation in this behalf urged that the candidates who had withdrawn did not come within the terms "duly nominated candidates" used in the section. On this question of the meaning of the term I agree with my learned brothers, the Chairman and Mr. Ghose the other Member of the Tribunal. I need not repeat here the detailed discussion of the question which has been set forth by my learned brothers in their judgment. In agreement with their views I find that the candidates who had withdrawn their candidatures under section 37 came within the term "duly nominated candidates".

But the question, in my opinion, cannot rest here. I do not share the views of my learned brothers regarding the effect of non-compliance and omission to implead as respondents "the duly nominated candidates" who had withdrawn their candidatures and their finding that the election petition for the failure to implead "the duly nominated candidates" must fail and be dismissed for non-compliance of section 82.

I do not agree with their views in regard also to the application filed by the petitioner to add "the duly nominated candidates" who were omitted as respondents in the election petition at this stage and their finding that this must not be allowed.

As to the question that the election petition was not sustainable on account of failure to implead the candidates who had withdrawn, the returned candidates who contested in the case relied mainly on the word "shall join" in section 82 and the general provision in section 80 of the Act that no election could be called in question except by an election petition presented according to the provision of part VI of the Act.

But it will be important to refer to section 85 and clause (4) of section 90 of the Act which provides respectively for the dismissal of the election petition by the Commission and the Tribunal. Both the two sections make mention of only sections 81, 83, and 117 which related respectively to the form of the election petition, the time within which it was to be presented and the security for costs which the petitioner was required to deposit, and the Act in the specific way limited the summary dismissal of the election petition either by the Election Commission or the Tribunal with respect only to the matters provided by sections 81, 83 and 117. There is no provision anywhere in the Act to suggest that an election petition should fail for non-joinder of any duly nominated candidate and that the non-compliance of section 82 should have the far-reaching consequences as urged although in section 85 and elsewhere in the Act such as sections 33, 34, and 36 where mandatory force was intended that has been clearly expressed. This on reasonable grounds gives an

indication that *ipso facto* failure of election petition without any further consideration was not contemplated as a consequence for the non-compliance in the matter of joinder of duly nominated candidates.

Section 90 of the Act referred to above has also importance in this behalf. As discussed by me more fully in the election case of Mr. Fida Hussain, this section 90 comprehensively gave independent right to all candidates, those who were duly nominated as well as others who claimed to be so to appear and file their written statements either in support or opposition of the election petition after the publication of the election petition in the Gazette by the Tribunal if they were not already on the record. The class which claimed to be duly nominated could only be the rare and very unusual class of candidates who came in by challenging the correctness of the rejection of their nominations. It could include no other class, for even with regard to the nominated candidate who did not deposit the security for costs under section 117, it was provided by section 34 of the Act that he would not be deemed to be duly nominated candidate. The Legislature if they had meant to limit the scope of section 90 and confined the appearance after the publication of the election petition to only the rare and unusual body of the candidates who claimed to be duly nominated, they should have said so in clear terms and not set forth the provision of section 90 in wide terms as it stands.

Next as remarked also in my judgment in the case of Mr. Fida Hussain the Act which by sections 110, 115 and 116 gave right to the general body of electors to appear to continue or oppose the election petition in case of the death of the petitioner or respondent and when the application was filed to withdraw the election petition, by its general scheme made the proceeding to be one not for the individual interest of the petitioner or the contesting respondent, but for the general interest of the Constituency as a whole and the body of electors residing there. If not literally the same in all details in essential spirit the proceeding in an election cases was one of a representative character and similar to that provided in Civil Procedure Code by Order 1 Rule 8. This too shows the right of appearance given by section 90 to be one given to the candidates independently in their own right which could not be effected by ignorance, mistake or negligence on the part of the petitioner is not impleading him in the election petition.

As a result if a duly nominated candidate who had been omitted appeared after the publication of the election petition under section 90, his prayer to file written statement which was based on his own independent right could not be rejected. The election petition which was defective for the absence from the record of the duly nominated candidate would have to be validated after the appearance and the proceeding allowed to be continued thereupon. But if section 82 had truly the mandatory effect in the far-reaching sense as urged, the election petition which was required by it to have all the duly nominated candidates on the record from the outset could not be validated by any event arising at a subsequent stage such as that of appearance after the publication of the election petition in the Gazette by the Tribunal. Having given the independent right comprehensively to all the candidates as remarked above the Act excluding the rare, unusual and undefinite class of candidates who claimed to be duly nominated candidates by assailing the scrutiny under section 36, seems to have required all the proper duly nominated candidates to be made parties at the early stage by section 82 by anticipation to obviate the delay that might be caused by their possible appearance at the late stage. In such circumstances the provision under section 82 could not be intended to be mandatory.

The same would appear to follow on the review of the general scheme of the Act and the frame of the proceeding. As evidenced by sections 110, 115, and 116 by which the electors were given the general right to appear at various stages when the petitioner or the respondent died or the application was filed for the withdrawal of the election petition, the proceeding in an election case broadly was of the nature of a representative proceeding provided in the Civil Procedure Code under Order 1 Rule 8 in the interest of the Constituency as a whole. This too along with section 90 as explained above militated against the argument that the election petition must fail for the failure to implead all the duly nominated candidates and section 82 to have the mandatory effect of the far-reaching character as urged.

The Civil Procedure Code providing by Order 1 Rule 8 that no suit must fail for non-joinder of parties makes a distinction between a proper party and a necessary party. By it the suit would fail only when the necessary party without whom no effective decree could be passed was absent from the record. But in the absence of what is termed proper party who was in some way interested but not such whose absence was to make the eventual decree altogether ineffective the Court in spite of his absence will proceed and pass the decree which will be justified in the circumstances. This principle of the Civil Procedure Code, as discussed more fully in my judgment in the case of Mr. Fida Hussain seems to be in view when section 82

of the Act was framed. Having required the nominated candidates to be brought on the record at an early stage the legislature seems to have left to the Tribunal to deal with the matter on merits on principles of Civil Procedure Code. If a necessary party like the returned candidate was left, the election petition could not certainly proceed in his absence but except such essential parties and others who were in some manner personally involved by the allegation in the election petition, others must be regarded as mere proper parties. In the circumstances section 82 must be taken as a mere directory provision and it could not have the imperative force so that election petition should fail *ipso facto* for omitting to implead any of the duly nominated candidates.

The word "shall join" in section 82 upon which great stress has been laid also cannot be too strictly adhered to. W. F. Craise in his treaties on the law of interpretation (2nd Edition) at page 117 has remarked thus:—

> ".....Meaning of ordinary words when used in Acts of Parliament is to be found. not so much in strict stymological propriety of language nor even in popular use, as in the subject or occasion on which they are used and the object which is intended to be attained." Next referring to affirmative direction like that one finds in Section 82 W. F. Craise in his treaties has remarked..... "No universal Rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory that implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

The same view as above has been set forth by Maxwell in his treaties on interpretation of statute (9th Edition) in chapter 1 section 3 pages 20 to 23 and pages 372 to 373. The same principle again has been laid down by the different High Courts in this country also and for this reference may be made to 11 C.W.N. page 1011 and 1943 Calcutta 266. So the word "shall join" in section 82 also will not help the respondent greatly.

Section 80 of the Act broadly should have meaning only to the effect that an election could not be challenged unless an election petition was filed. It will be wrong logic to give mandatory force indiscriminately to all the provisions in the Act some of which as has been shown above in regard to the very section 82 in question may have been essentially only directory in character. The meaning and the force of the provision have got to be considered independently and section 80 which was referred to on behalf of the contesting respondent will also not be helpful to him in this connection.

It appears that the Lucknow Tribunal in the election case of Shree Pritam Singh dismissed the election petition for failure to implead all the nominated candidates. In Duabia's election cases there were reports of cases which were dismissed on the same ground. But as I have shown more fully in my judgment in Mr. Fida Hussain case the decisions in the cases reported in the book of Duabia, which were based on old Rules which were in force before the present Act and in which all the nominated candidates were required to be impleaded only when the petitioner claimed the declaration for the validity of his own election could not be applied in the present case under the present law which provided for the impleading of the nominated candidates in all circumstances irrespective of the relief claimed on a different principle and not merely on the consideration of the individual interest which was the case with the old Rules.

As to the case of the Luckow Tribunal it will be noted as, more fully shown in the judgment in Mr. Fida Hussain's case that there was no unanimity of decision on the question. In the circumstance with all respects I could not adopt the views of the Member of Lucknow Tribunal also in the present case. Having regard to the underlying basic scheme of the Act and the object and purpose of the provision of Section 82, "the duly nominated candidates" contemplated under section 82 in my view were mere proper parties unless the Tribunal finds from the allegations to be not justly possible to pass an order in their absence it cannot for the mere failure to implead the duly nominated candidates dismiss the election petition.

Next as to the question if the candidates who had been omitted in the present case were necessary parties, I may point out that they had withdrawn their candidatures and had not appeared after the publication of the election petition under section 90 though they had a right to that. There is nothing in the election petition or even in the written statement affecting them personally and in the circumstances I consider that they were not the necessary parties and in my opinion in their absence without any injustice the proceeding on the election petition could proceed.

As mentioned by me also in the case of Mr. Fida Hussain I have to note here that primarily by section 85 the power to dismiss the election petition had been reserved in the hands of the Election Commission. The Tribunal in true sense according to the scheme in the Act was appointed mainly for the trial of the election petition on merits and under the old law the Tribunals were not given power to dismiss the election petition on technical grounds. Even under the present law when they have been given that power wide discretion had been left by clause (4) of section 90 in that behalf. Further from the judgments of Rewan and other places that were filed here it appears that in several cases the petitioners had failed to implead the candidates who had withdrawn and at Rewan out of eleven cases in eight such was the case. Here also out of six cases in three the petitioner did not implead the candidates who had withdrawn. Impression seems to have gone round that candidates who had withdrawn were not needed to be impleaded and in this behalf section 38 of the Act which requires separate publication of the names of the candidates who remained to go to polls after withdrawal seems to have played a large part. A wrong impression will be no excuse against law, nevertheless the circumstances show that the petitioner in not impleading the nominated candidates named were under *bona fide* error and when the Tribunal had wide discretion, as remarked above, this must be taken into consideration. In view of the facts and circumstances of the case in my opinion this election petition cannot fail for the nominated candidates named not being made parties.

The petitioner filed an application to add as parties the nominated candidates who had been omitted and for which the contention was raised here. As discussed fully in my judgment in Mr. Fida Hussain's case the provision of the Civil Procedure Code under Order 1 Rule 10 applied here. As the omitted candidates were mere proper parties, the question of limitation could not stand in the way. Therefore although as remarked by me above the omitted candidates were not necessary parties, still when the petitioner has filed an application it would be appropriate to add them as parties.

Therefore I do not share the views of my learned brothers, the Chairman and Mr. Ghose the other Member of the Tribunal and in conclusion I hold that the election petition was not vitally defective for the candidates named above not being impleaded. In my view the prayer of the petitioner to add the omitted candidates as respondents should also be allowed and I find accordingly in the case.

(Sd.) GOBIND SARAN, *Member.*

The 29th January 1953.

ORDER OF THE TRIBUNAL

The position, therefore is that two of us, Mr. S. B. Sengupta and Mr. N. K. Ghose, are of the view that the entire election petition must be dismissed for non-joinder of the candidates in question, that these candidates cannot be added as respondents and that the petition for amendment filed by the petitioner to that effect must be dismissed. But the third Member Mr. Gobind Saran disagrees and his view is that the election petition is maintainable and can proceed in the absence of the candidates in question and also that it will be more appropriate to add them as respondents as the petitioner has made a prayer to that effect.

Under section 104 of the Act if there is a difference of opinion amongst the Members of the Tribunal the opinion of the majority shall prevail and the orders of the Tribunal shall be expressed in terms of the views of the majority.

The order of the Tribunal therefore is that the entire election petition be dismissed with costs of Rs. 150 including pleader's fee, payable by the petitioner to the contesting respondent No. 1.

(Sd.) S. B. SEN GUPTA, *Chairman.*
(Sd.) N. K. GHOSE, *Member.*
(Sd.) GOBIND SARAN, *Member.*

The 29th January 1953.

[No. 19/113/52-Elec. III.]

S.R.O. 283.—The Election Commission Notification No. 19/142/52-Elec.III, dated the 24th January, 1953, published in an Extraordinary Issue of the Gazette of India, Part II Section 3 (No. 26) of 24th January, 1953, is hereby cancelled.

[No. 19/142/52-Elec. III.]

S.R.O. 284.—WHEREAS the election of Shri Attar Singh, as a member of the Legislative Assembly of the State of Patiala and East Punjab States Union from the Badra-Satnali Constituency of that Assembly, has been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951) by Shri Lahri Singh son of Ch. Khubi Ram, Village Paintwas Kalan, P.O. & Tehsil Dalmia Dadri, District Mohindergarh, PEPSU;

AND WHEREAS, the Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Election Commission;

NOW THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, PATIALA

V. B. Sarwate—Chairman.

Raghunandan Saran, } *Members.*
E. M. Joshi,

ELECTION PETITION NO. 214 OF 1952

PETITIONER:

Lahri Singh S/o Ch. Khubi Ram, village Paintawas Kalan, P.O. & Tehsil Dalmia Dadri, District Mohindergarh, PEPSU, a candidate for Badhra-Satnali Constituency for election to the Patiala & East Punjab States Union Legislative Assembly for which the election was held.

Versus

RESPONDENTS:

1. Attar Singh S/o Ch. Lok Ram Jat of village Mandhi Harya P.O. Badhra, Teh. Dalmia Dadri, District Mohindergarh, PEPSU, member of the PEPSU, Legislative Assembly.
2. Hari Singh S/o Ch. Harphul Singh of village Badrai, P.O. Satnali Tehsil and District Mohindergarh, PEPSU, who stood for election but was defeated.
3. Mehtab Singh S/o Mohar Singh of village Dalawas, P.O. Badhra, Tehsil Dalmia Dadri, District Mohindergarh, PEPSU, who stood for election but was defeated.
4. Rameshar S/o Kanhiya Lall Village Berla, P.O. Badhra Tehsil Dalmia Dadri, District Mohindergarh, PEPSU, who stood for election but was defeated.
5. Mangla Ram S/o Mohan Lal Village Dalawas, P.O. Badhra Tehsil Dalmia Dadri, District Mohindergarh, PEPSU, who stood for election but was defeated.
6. Ram Krishan S/o Kashi Ram of Dalmia Dadri, District Mohindergarh, PEPSU, who was nominated, but withdrew his candidature.
7. Nihal Singh S/o Ch. Amir Singh Village Bhagvi, Tehsil Dalmia Dadri, District Mohindergarh, PEPSU, who was also nominated but withdrew his candidature.

Order Delivered on 31st January 1953

From the Badhra-Satnali Constituency the Respondent No. 1 Attar Singh was declared returned to the PEPSU Legislative Assembly in the last general election in which the contestants were the petitioner and the respondents 1 to 5. The votes received by each of these are stated in para 2 of the petition and are not disputed. The respondents 6 and 7 were also nominated but withdrew their candidature before election. The respondent No. 1 secured the highest votes 3019, the respondent No. 2 came second with 2151 votes and the petitioner was third with 2119 votes.

2. The petitioner Lahri Singh presented this election petition claiming the seat for himself after avoiding the election of respondents 1 and 2. The main ground of the petitioner is the alleged improper acceptance of the nominations of respondents 1 and 2. It is alleged that both of these were disqualified because they had not attained the qualifying age of 25 years at the time of their nomination. Another disqualification was alleged against respondent No. 2 Hari Singh that he was holding an office of profit under the State Government as a teacher in the Government High School at Mohindergarh. Against respondent No. 1 Attar Singh, the petitioner made allegations of certain corrupt practices in that he had circulated false

statements regarding personal character and conduct of the petitioner in two posters which he was alleged to have got printed and distributed, that on his behalf an appeal had been made to the voters on the ground of his gotra 'Sheoran' in certain named villages where there were numerous voters belonging to that gotra, that he had obtained assistance of Public Servants—one Jamadar Chhajju Ram and the Returning Officer himself—in furthering the prospects of his election and that his return of election expenses was inaccurate and deficient in certain particulars. It was claimed that these corrupt practices had worked inmaterially affecting the result of the election.

3. The respondent No. 1 has vehemently opposed the petitioner controverting all the grounds alleged by the petitioner. The respondents 2, 4 and 6 who also filed their written statements supported all the grounds made by the petitioner. The respondent No. 2, however, pointed out that he had resigned his appointment as teacher in the Government School before filing his nomination paper and was also of the qualifying age on the date of the nomination; and the respondent No. 6 stated that though the election of respondent No. 1 should be set aside, the petitioner should not be declared elected.

4. The following were the issues fixed for trial:—

1. (a) Did Respondent No. 1 or his agents distribute among voters posters containing statements as portions marked in list 'A' or make such statements in public meetings?

(b) Did Respondent No. 1 or his agents exercise any undue influence on the voters in the manner alleged in list 'B' by the petitioner?

(c) Did Respondent No. 1 obtain in his interest assistance of any Government servants as alleged by the petitioner in list (c)?

(d) Was the election of respondent No. 1 procured or was the result of the election materially affected by any corrupt or illegal practice and is the election of respondent No. 1 liable to be declared as void?

2. Is the return of election expenses made by Respondent No. 1 false in any particulars or otherwise improper as averred in list 'D' by the petitioner?

3. (a) On what date was Respondent No. 1 born?

(b) Was he of the qualifying age of 25 years at the time when his nomination was accepted?

(c) Was his nomination improperly accepted and is his election liable to be declared as void on that ground?

4. (a) Was Respondent No. 2 holding an office of profit under the State Government at the time when his nomination was made?

(b) On what date was Respondent No. 2 born? Was he not of the qualifying age of 25 years when his nomination was accepted?

(c) Was the nomination of Respondent No. 2 imporperly accepted?

5. Is the petitioner entitled to a declaration that he is duly elected?

6. What is the proper order to be made in this case under Sections 98 and 99 of the Representation of the People Act, 1951?

5. At the stage of the trial the respondent No. 6 Ram Kishan also claimed a right to produce evidence in support of the grounds made by the petitioner in addition to what evidence the petitioner himself might choose to produce. At the election the petitioner was a candidate sponsored by the Congress Party. The respondent No. 6 was also nominated by that party but had withdrawn his candidature in order to give a chance to the petitioner. The election petition by the petitioner was thus more in advancement of the cause of the Congress Party than of the petitioner personally. When the petition came up for hearing, it seems to have been felt by the party that due to certain influences the petitioner was likely to join hands with the returned candidate belonging to the opposite camp, and the respondent No. 6, still a sound adherent to the Party's cause came up with a claim of his right to produce evidence in support of the allegations in the petition. By our detailed order passed on 27th October 1952 we conceded him this right. That order is reproduced as annexure 'A'. During the progress of the trial, the petitioner made a prayer that he should be allowed to withdraw his plea regarding assistance of public servants in furtherance of the prospects of the election. This was not acceded to by us because it seemed to us that the petitioner himself had remained from producing evidence on issue 1(C) and that the prayer for withdrawal of the plea had been collusively made to prevent the respondent No. 6 from producing on the point the evidence which he had ready with him. We accordingly proceed to determine all the above issues on the evidence produced by

the petitioner and the Respondent No. 6 in support of the petition and by the respondent No. 1 in opposing it.

6. *Issue III.*—We first take up the consideration of the issues regarding the alleged improper acceptance of the nominations of the respondents 1 and 2. According to Article 173 of the Constitution one of the qualifications for being chosen to fill a seat in a State Legislative Assembly is that the candidate shall not be less than 25 years of age. This age should be shown to have been attained at the time of the filing of the nomination paper. In his nomination paper the Respondent No. 1 Attar Singh gave his age as 26 years and this was accepted without proof. There is no evidence that any objection to his nomination to the State Assembly was raised on the ground that he suffered from the age disqualification. This is a statutory disqualification and, therefore, we would not be precluded from giving effect to it even though it may not have been taken at the time of the scrutiny of the nomination. Attar Singh had filed two nomination papers for the House of the People Seat of the Mohindergarh Constituency in which also he had shown his age as 26 years. In the proceeding of scrutiny of one of these a certificate from the Head Master of the Dadri High School had been produced to show that according to the School Register Attar Singh's date of birth was 1st May 1927. If this be accepted as the correct date of bith, then Attar Singh had not then attained the age of 25 years and so was equally disqualified for the House of the People Seat according to Article 84 of the Constitution. In the particulars given in paragraph 2 of the list C attached to the petition, it is stated that in the scrutiny of the nomination paper for the House of the People Seat the same Returning Officer Shri R. S. Palta had found against Attar Singh on the point of his age and had rejected that nomination on the two grounds of under age and insufficient security deposit but that subsequently that officer had changed that order and substituted it by an order showing that rejection was on the sole ground of insufficient security deposit. A foundation for proving this allegation was laid in the circumstance that in the file of that nomination paper the sheets were arranged and marked with serial numbers after the order was passed and the file was treated as disposed of and from the position of the sheet containing this order it would be marked '6'—the previous and the following sheets being numbered '5' and '7'—but the sheet containing the order now found in the file does not bear any serial number. Though the petitioner produced no evidence on the point, the Respondent No. 6 Ram Kishan Gupta in the witness-box (6 R.W. 15) stated that objection on the ground of age to the House of the People nomination paper was raised before the Returning Officer and was discussed by him. This may indeed be believable in view of the School certificate referred to above in the file of that nomination form. Ram Kishan further says that the Returning Officer had expressed opinion that Attar Singh was under age. He, however, stops short there and does not state what order was actually passed by the Returning Officer. It appears that Attar Singh in the scrutiny of his other nomination had produced copy of entry in the register of births of his village Mandi Hariya. This may have satisfied the Returning Officer that the candidate was in fact 26 years of age, as he was asserting and the objection which according to Ram Kishan had been discussed at the time of scrutiny of one form of nomination was found to be without substance and was not even referred to in the order which according to Ram Kishan was to be passed later in the evening. The order passed on both the nomination forms is the same *viz.*, one of rejection on the ground of insufficient security deposit and it may be that the sheet in the one case was through inadvertence of the clerk left unmarked with the figure of '6'.

7. We will not therefore be justified in inferring that the rejection of that nomination was on the ground of age also and that the order has subsequently been replaced. It is also no where suggested that anything of that kind happened with the scrutiny of the nomination for the State Assembly seat. Indeed all these allegations against the Returning Officer have been made in the petition as one set of particulars of the corrupt practice of procuring aid of Government officials in furtherance of the election. We do not think that anything is to be made of this circumstance for proof of the corrupt practice also for the simple reason that it was not intended in the petition even by inference to say that an objection as to age was taken at the time of scrutiny of the State Assembly nomination.

8. On the evidence produced before us, we feel satisfied that Attar Singh was born on 24th January, 1926 and was, therefore, more than 25 years of age at the time of the nomination. The evidence produced on the other side on the point of age is of the entries in the school, college and university records. In the Dadri High School where Attar Singh started his secondary education his date of birth was given as 1st May, 1927 (*vide* evidence of Jai Bhagwan Bharadwaj Head Master of that School, 6 R.W. 5). The Head Master is unable to say on whose information that date of birth was noted in the School Register. Presumably it must have been the father or some other person acting as the guardian who put him in that

school. But about such person again we have no means to know that material he had from which he was able to give this date as the correct date of the boy's birth. If any thing the Head Master's evidence brings out his experience of the irresponsible manner in which parents and guardians in that part give information about the date of birth of wards without caring to ascertain the precise date from sources which may be available to them. Obviously the evidentiary value of such entry in the School Register cannot be much. During Attar Singh's subsequent educational career, this date noted in the School Register was repeated whenever there was occasion to mention his date of birth and was accepted by the authorities concerned—no body having any special interest to know his actual age precisely and for that purpose to verify the correctness of the School Register entry or the subsequent entries based on the same. Thus from the evidence of Jai Gopal 6 R.W. 12 it appears that in Punjab University Matriculation Examination of 1945 the date of Attar Singh's birth was given as 1st May, 1927 and the same date was mentioned in his application for grant of Intermediate Examination Diploma for Social Service and in the result of that examination. In fact in that application there appears to have been an attempt on the part of Attar Singh to show himself younger still by first entering the date of birth as 15th March, 1929 later corrected to 1st May, 1927 to bring it in conformity with the date given in the Matriculation Certificate. This only emphasises his desire to appear younger than he actually is, when he feels it would be an advantage to him to pass for a younger person but does not help us to accept either of those dates as the correct date of birth. The evidence of Ram Singh 6 R.W. 14 the Office Superintendent of the Rohtak College shows that though Attar Singh in his application for admission to the 1st year class of that college had written the date of birth as 1st May, 1927 to make it correspond with the entry in the Matriculation certificate, in the application for admission to the 3rd year class (Ex. 6 R. 16) he gave the date of birth as 15th March, 1927. This last named application purports to be signed also by Loke Ram in the place for parent or guardian's signature but there is no proof that actually that signature is in Loke Ram's writing. We cannot, therefore, treat that application as a statement of Loke Ram, who died on 6th June, 1949, about the date of birth of his son Attar Singh.

9. The production of all these records has been with the object of showing that Attar Singh was born in the year 1927 but as we have seen, in them that year has come to be mentioned necessarily on the basis of the initial entry in the school register of Dadri about the accuracy of which we are not assured. We do not think that its oft repetition should give any added strength to its evidentiary value. At the time when he began his schooling in the Primary class, Attar Singh's date of birth was mentioned as 16th January, 1924, as appears in the evidence of Kharag Singh (6 R.W. 2), Head Master of Primary School, Pichopa. Neither party relies upon that as the correct date of birth and the use of that entry is only to confirm us in our view that school register entries though relevant evidence cannot always be depended upon as reliable evidence of the date of birth.

10. Attar Singh in his own evidence has explained that when he thought of standing for election, he looked for accurate evidence of his birth date and got it in the register of births of his village Mandi Hariya as 24th January, 1926. This register is Exhibit 1 R1 and it contains an entry Serial No. 887 recording birth of a son to Loke Ram son of Gura Jat. The entry also mentions the name of Nand Lal in the column of Namberdar of the village evidently as the name of the village official responsible for communicating information about this birth in his village. If this entry can be related to Attar Singh, we can have in it a definite proof of his date of birth. We feel satisfied that the entry refers to the birth of this Attar Singh and no other person. It is not suggested that there was any other person of the name of Loke Ram son of Kura Jat than the father of Attar Singh. Nand Lal 1 R.W. 8 who is an old man of over eighty years states that there was not any other Loke Ram except this son of his younger brother Kura Ram and that Attar Singh was the only male child born to Loke Ram. This fact is established beyond doubt by the evidence of other witnesses examined on behalf of Respondent No. 1. We do not feel disposed to believe the two witnesses Kharga 6 R.W. 6 and Ram Sarup 6 R.W. 10 on their statement that one more male child was born to Loke Ram two years before the birth of Attar Singh. If this were a fact, the register of births and deaths which was produced before us from the Office of the Deputy Commissioner, Sangrur by Sarwan Singh 1 R.W. 3 and which was for the years 1921 to 1935, should have shown another entry about birth of a son to Loke Ram or the entry relating to the death of a son of Loke Ram if that child died as an infant as these witnesses would seem to suggest. This it did not. Nand Lal's (1. R.W. 8) evidence definitely fixes the relation of this entry of 24th January, 1926, as pertaining to the birth of Attar Singh. He was Namberdar

of the village at the time of this birth and is evidently the person whose name is mentioned in the entry as the informant. He could not of course be expected to remember the date of birth exactly but says that Attar Singh should be now 27 years of age and he has been able to recall this so definitely because Attar Singh was born during the mourning period of the witness's mother's death. We are thus well satisfied that Attar Singh's date of birth is 24th January, 1926 and he was of the qualifying age and the acceptance of his nomination was not improper.

11. *Issue IV.*—Respondent No. 2 Hari Singh having lost to Attar Singh in the contest and not having made an election petition claiming the seat for himself is not now interested in maintaining that his nomination was properly accepted. He has accordingly taken no steps to contradict the evidence furnished by the record of the University and of his service as Teacher in Government School in which his date of birth has been consistently shown as 1st January, 1928. He stands to gain no advantage by showing that actually he is older in years than what that date of his birth which has been accepted as correct hitherto, makes him out to be. We have, therefore, to find his date of birth to be 1st January, 1928 and to hold that his nomination was improperly accepted.

12. For another reason also we have to find the acceptance of his nomination not to have been in order. He was in the service of the State Government as Teacher in the Mohindergarh High School. This would work as a disqualification for membership of the State Legislative Assembly under Article 191(1)(a) of the Constitution. But Hari Singh appear to have been keen upon standing for the election. Therefore, on 18th October, 1951 a few days before the last date for filing nomination he tendered his resignation and he ceased to attend to his duties from that date (*vide* evidence of Magni Ram P.W. 8) we find, however, from the evidence of Mr. Banarsi Das (P.W. 9) of the Education Department, Government of Pepsu, that the Government did not accept this resignation because they had notified all Government Servants in November, 1950 that the Government servants who intended to stand for election were to intimate of their intention before 1st February, 1951. At the time of acceptance of Hari Singh's nomination the position, therefore, was that though he had ceased to attend to his duties, his registration not having been accepted, he was to be regarded as being still in service and so for purposes of election under a disqualification as holder of an office of profit. It is immeterial if he did not want to claim any salary after 18th October, 1951. Under Article 310 of the Constitution his service was dependent on the pleasure of the Government and his resignation not having been accepted the disqualification of being the holder of an office of profit continued to operate. The consideration to be borne in mind in the case of an office of profit is not whether the holder himself made profit out of the office but whether the office was one which enabled him to make profit. The Government having continued him in the appointment would have paid him his salary also if he had continued to earn it by his work. We must, therefore, find that Hari Singh continued under the disqualification provided in Art. 191(1)(a) of the Constitution and his nomination was improperly accepted. He could not, therefore, be declared elected even if the election of Respondent No. 1 is found to be liable to be set aside.

13. *Issue I.*—List 'A' of the particulars contains allegations of two posters having been published on behalf of the Respondent No. 1, one by Kundan Singh and the other by Mul Chand Gupta, and of their free distribution by these persons and by Attar Singh himself. These posters contain offending allegations respecting the petitioner Lahri Singh which it is urged amount to the major corrupt practice specified in clause (5) of S. 123 of the Representation of the People Act. One copy of each of these in print has been produced by the petitioner. They are Exhibits P. 10 and P. 11. From the name of the Press printed on them, it would appear that the posters were got printed at the Bharat Printing Press Bhiwani, and Kundan Singh and Mul Chand Gupta whose names are subscribed to them were alleged to have worked as polling agents of Attar Singh and so to be in the category of Attar Singh's agents within the meaning of Clause (5) of S. 123. The reply of Attar Singh to all these allegations stated in full details in para. 5 and lists A-1 and A-2 of the petition was very curt. It was a denial that any corrupt practices as alleged were committed and a statement that the posters were never issued by or to the knowledge of Respondent No. 1.

14. After the election petition was presented, the respondent No. 1 became a Cabinet Minister in the Pepsu State and we have no doubt that he has tried to make use of that position in eliminating so far as possible the evidence which might have been available to prove the allegations in the petition. As we have observed the petitioner himself has been influenced to the extent of becoming indifferent to the prosecution of the petition. In fact the witnesses whom the

petitioner examined on his side came to state that they never saw any such posters distributed during election time. The Respondent No. 6 in his attempt to prove this corrupt practice also found that the influence of Respondent No. 1 had worked. He could give his own evidence that he had seen these posters distributed in some villages and produced three witnesses Net Ram 6 R.W. 7, Narsingh Dass 6 R.W. 8 and Bishan Dass 6 R.W. 11 who deposed about distribution of one or the other of such posters in their villages. We cannot make anything of such evidence regarding distribution without adequate proof to satisfy us that such posters were in fact got printed by or on behalf of Attar Singh. The Respondent No. 6 made all efforts to produce what evidence could be available. The Proprietor of the Bharat Printing Press, Banarsi Dass Gupta 6 R.W. 1, was called as witness but he was found to be a very unwilling witness. He had to admit that Attar Singh got his printing done in his Press in connection with the election but produced three other leaflets as the ones which he could trace out as having been printed in his press. Though allowed two chances, he did not produce the register in which orders about printing were being entered in his press and disclaimed all knowledge about posters like Ex. P-10 and P-11 being printed in his press stating that during the election time he was not personally attending to the business of the Press but had left it in the hands of his nephew, Dharam Pal. The Respondent No. 6 could not be expected to call Kundan Singh or Mul Chand Gupta as witnesses on his side though their names appeared on the posters because they were Attar Singh's workers. Mul Chand Gupta in fact came as witness for Respondent No. 1 (1 R.W. 14) to deny that he got such posters printed or distributed. He admitted, however, that he had been polling agent of Attar Singh and that after Attar Singh had become Minister, he was appointed in Government service in Industries Department which is in Attar Singh's Portfolio as Minister.

15. To say that the whole story about such posters having been printed and distributed is false as Attar Singh wants by his written statement to make out, is to ask us to conceive that the petitioner was so daring in making out a case of corrupt practice against Attar Singh as to fabricate two posters containing all nasty allegations against himself and get them printed with the name of the Press at which Attar Singh was getting his printing done and of the names of his two polling agents knowing well enough the Press proprietor and these two men after enjoying patronage of Attar Singh could not be expected to help him with evidence to prove his allegations. We find it difficult to conceive all this as mere fabrication, but this would only amount to our strong suspicion regarding truth of the printing and distribution of such posters. We realize that mere suspicion howsoever strong cannot be a substitute for proof by legal evidence. Such evidence has not been put before us to an adequate extent nor is any proof given that the statements contained in the posters are false to enable us to find in favour of the petitioner on this point. We, therefore, answer issue 1(a) in the negative.

16. *Issue* 1(b) refers to the allegation of the propaganda by the respondent No.....appealing to the voters to vote in his favour on the ground of his Gotra affinity with them. There is no evidence worth the name on which we can find that such propaganda was in fact done. We have also expressed an opinion recently in another case (Pratap Singh *v.* Ch. Nihal Singh Takshak disposed of on 6th January 1953) that appeal to voters in the name of *Gotra* does not constitute a corrupt practice of the kind specified under Clause (5) of S. 124 or under clause (2) of S. 123 of Representation of People Act. In view of this no argument was addressed to us on this issue. We accordingly find this issue also in the negative.

17. When these corrupt practices are not proved, the question of the result of the election being materially affected by reason of them does not arise. The third corrupt practice alleged is of obtaining assistance of Government servants for furtherance of the prospects of the candidate's election which will be covered by clause (8) of Section 123 of the representation of the People Act. The clause is as under:—

> "(8) The obtaining or procuring or attempting to obtain or procure by a candidate or his agent or, by any other person with the connivance of the candidate or his agent, any assistance for the furtherance of the prospects of the candidates election from any person serving under the Government of India or the Government of any state other than the giving of vote by such person."

18. The counsel arguing for respondent No. 6 was right in pointing out that the legislature in enacting this clause in such comprehensive terms has shown itself very jealous about maintaining the purity of elections by prohibiting the help in any form being obtained by any candidate in furtherance of his election from any government servant of any part of India in any manner whatsoever except the giving of vote by such servant. Even an attempt at obtaining such help has been

penalised. The penalty provided under clause (b) of sub-section (2) of Section 100 of the Representation of People Act is a declaration by the Tribunal of the Election of the returned candidate being void without damanding, as in cases of other corrupt practices, of proof that the result of the election has been materially affected by reason of commission of this corrupt practice. The employment of a government servant for the purposes of his election by a candidate is thus in all consciouness a very serious matter.

19. The respondent No. 1 undoubtedly became alive to this legal position with all its seriousness on finding allegations of this corrupt practice embodied in the election petition. The allegations are under three heads—the first referring to the employment of Chaudhri Chhajju Ram as polling agent and the second and third to the help given by the Returning Officer, Shri R. S. Palta. We have already referred to the second head in paragraph 7 above and expressed our opinion that what the Returning Officer did during scrutiny of the nomination does not amount to corrupt practice in furtherance of the election of Attar Singh. Under the third head this charge was made against the Returning Officer because he had not allotted the Congress Party's symbol of "Two Bulls with Yoke" to the petitioner though the Congress Party had adopted the petitioner as its nominee. This allegation was not attempted to be substantiated in the trial and was not even referred to in the arguments. We, therefore, negative this third head also.

20. This leaves us with the allegation in respect of Jamadar Chhajju Ram. The particulars concerning this man as stated in para 1 of list 'c' described him as Chhajju Ram son of Sheo Lal Jat of village Mandi Hari, which is the village of respondent No. 1 also. Chhajju Ram was described as being a Government servant in two capacities (1) as a Jamadar or Junior Commissioned Officer in the Indian Army serving in the 7th Light Cavalry and (2) as Lambardar in his own village which is part of the constituency. It was stated that Chhajju Ram was on leave in the village during the days of polling in this constituency and the Respondent No. 1 had not only generally taken Chhajju Ram's help as an Army Officer in influencing voters in his favour but even actually to influence the voters at Nandha Polling Station No. 7 to vote for him by appointing him as his polling agent there on the 10th and 11th of January, 1952 which were the two days of polling for that polling station.

21. As an Indian Army Officer Chhajju Ram would be a servant of the Government of India. His description as Lambardar meant that he was a village Head Man according to the connotation of that term in the PEPSU and was thus a person serving under the State Government according to the explanation to Clause (8) of Section 123 of the Representation of the People Act. We have ample evidence and even admission of the Respondent No. 1 himself now about this Chhajju Ram being both an Army Officer and a Lambardar of the village and being otherwise well known to the Respondent No. 1 the two being related not very remotely. With all the specific allegations made in list C on this point and with the legal position as above adverted to, the Respondent No. 1 could not have remained ignorant of how and why this corrupt practice was ascribable to him and of the seriousness of its implications. If he had any substantial defence against the charge, we should have expected him to come out with a clear statement of such defence in the written statement. On the contrary his whole conduct in this case, to which we will presently refer, shows that he realized at once that in view of his having committed himself by appointing Chhajju Ram as polling agent he was undone. He found himself trapped in an inconvenient hole and started fencing with the charge waiting for some thing to turn up which he might make use of in his attempt to extricate himself out of it.

22. In his written statement in replying to para 5(c) of the petition which made reference to this corrupt practice he contented himself by a brief and evasive denial,

> "The contents of clause (c) of para No. (5) are altogether false and frivolous."

His reply to the detailed particulars in para 1 of the list (c) was not more illuminating,

> "It is submitted that contents of para. No. 1 of the particulars are incorrect. The petitioner never visited the said polling station and he can have no personal knowledge of the facts stated therein, and all that is contained therein is based on hear-say".

The comment of the counsel for Respondent No. 6 about this defence was that Attar Singh had made such statements advisedly in the hope that as a Minister in the Government of the State, he would be enabled to cause disappearance of the forms of appointment of Chhajju Ram as Polling Agent and that having been accomplished it would be possible for him to urge that his denial about such appointment having been ever made was true and that so far as the petitioner alleged that Chhajju Ram was actually present there on polling days and influenced the voters, he could then characterise such statement as mere hearsay since the petitioner himself did not go to the polling station.

23. Another step taken by the Respondent No. 1 was to win over the petitioner who as we have observed has been from the very first day of hearing before us showing himself indifferent to the prosecution of the petition. He did not take any steps to call for proof of the corrupt practice though it was so easy of proof and yet so telling. He did not even mention the form of appointment of Chhajju Ram as Polling Agent in his list of documents to be exhibited in the trial nor called any witnesses to prove that Chhajju Ram acted for Attar Singh at Nandha. The Respondent No. 6 who appears to have scented this attitude of the petitioner from the very first hearing remained vigilant and at every step took care to fill up the gaps of proof which the petitioner was leaving out.

24. On 28th October 1952 the Respondent No. 6 applied for the forms of appointment of polling agents at Nandha to be sent for from the Returning Officer in whose office they were in deposit along with other records of the election. On the same day he delivered an interrogatory to be answered by Attar Singh since it was not clear from his written statement whether the denial of Attar Singh was about appointment of Chhajju Ram as polling agent or even about Chhajju Ram being a Government servant. The interrogatory was:

> "Did you appoint for 10th and 11th January, 1952, Jem. Chhajju Ram son of Sheo Lal Jat of village Mandi Hariya Teh. Dalmia Dadri and district Mohindergarh, a person serving in the Indian Army as your polling agent for the polling station of Nandha?".

The description of the man was given in full detail so that the Respondent No. 1 may not be able to raise doubt about identity of Chhajju Ram with reference to whom the interrogatory was put as also to find out if the respondent was prepared to admit that Chhajju Ram was an Army Officer. This however, did not help because Attar Singh's reply was again of the same type, short and evasive, "I do not remember".

To another interrogatory

> "Is there any other Jem. Chhajju Ram son of Sheo Lal Jat of village Mandi Haria who is also a Lambardar?

The reply vouched was,

> "Question does not arise".

A person who makes answers in this fashion stands in our opinion self-condemned.

25. The papers did come from the Returning Officer on 4th November 1952 and they were found to contain a form (6) about appointment of Chhajju Ram son of Sheo Lal P. S. Badhra by Attar Singh over his own signature and with a direction to attend the polling station Nandha (Ex. 6 R. 20). Immediately as this was produced before the Tribunal, the petitioner realized that proof to the hilt of the corrupt practice was being available in spite of his own indifference in prosecuting the petition and the evasive replies of the Respondent No. 1. He immediately put in a petition that he desired to withdraw, not the whole petition which would have given the Respondent No. 6 an opportunity to step in as a petitioner himself to prosecute it, but only the allegation regarding assistance of government servants made in para 5(c) of the petition. No secret was made that this prayer for withdrawal of the allegation was with the object of keeping out the evidence of Ex. 6 R. 20. This clearly showed that the petitioner was hand and glove with the Respondent No. 1 and this was a gesture to help him in a difficult situation out of which he himself was unable to think a way out. At the time we ordered that we would admit the evidence provisionally and act on it if we did not accede to the prayer for withdrawal. As already stated we have since decided that we could not permit withdrawal of this allegation only, especially when the withdrawal was patently collusive.

26. On the form of appointment being tendered in evidence, the question still remained of proving it since Attar Singh had been evading a reply whether he had made such appointment on a prescribed form. If he persisted in denying even his signature, then the only way for Respondent No. 6 to prove it was by calling a handwriting expert in evidence. On his request, therefore, the Tribunal ordered that Attar Singh should see the form and make a statement whether it was signed by him or not and whether Chhajju Ram named therein was the same person who had been referred to in list C of the petition. This order was made on 6th November 1952 and thereupon Attar Singh's counsel promised to file a statement on the points the next day. Nothing however was done and the Tribunal had to reiterate the order on 28th November 1952 and to call upon the statement to be made on 4th December 1952. That day again no statement was made and his counsel raised an objection that the Tribunal had no power to require the Respondent No. 1 to make any statement about that document at the instance of Respondent No. 6. We ruled out this objection and again ordered that statement should be made on the next day. That was not done on 5th December 1952 either, and on 6th December 1952 we had again to call attention to this avoidance and to fix the case for 8th December, only that we might know finally if the statement was going to be made or not. Thus cornered the Respondent No. 1 with utmost reluctance made a statement through his counsel on 8th December 1952 which is now his defence to this charge of corrupt practice. The signature of Attar Singh was now admitted to be in his own handwriting and the identity of that Chhajju Ram named in the form of appointment as polling agent with the Army Officer and Nambardar of that name as alleged in the petition was also admitted but it was sought to explain that Attar Singh had signed a blank form and that some other person mentioned Chhajju Ram's name in it and that Chhajju Ram did not actually act as polling agent at Nandha.

27. Apart from the fact that this belated explanation would be considered incredible coming as it did after all those attempts at evasion and concealment, there was intrinsic evidence in the form of appointment itself to show that Chhajju Ram did attend the Polling Station with that authority of appointment and the Presiding Officer Mr. K. C. Sharma obtained Chhajju Ram's signature on the form and himself signed on it according to the prescribed formalities for allowing a polling agent to work as such. This was done on the 10th January. There were polling agents of other candidates also whose forms of appointment were similarly dealt with by the Presiding Officer and all these forms were sent to the Returning Officer in the evening of the 10th. The next day the same polling agents as had worked on the 10th attended the polling station and worked for their candidates. No new polling agents came in and the Presiding Officer sent his report of the 11th January in these words.

> "Written authorities of candidates appointing their polling agents were sent yesterday. No new agents turned up today the 11th January, 1952."

This record definitely shows that Chhajju Ram not only acted as Polling Agent of Attar Singh on the 10th but also on the 11th January.

28. Yet Attar Singh gave evidence in the witness box to induce us to accept the correctness of the statement made by his counsel on his behalf on 8th December 1952. He has stated that he learnt on the morning of the 10th January that Chhajju Ram had proceeded to Nandha to work as Polling Agent for him and that therefore he ran up to Nandha and reaching there before Chhajju Rom had arrived told the Presiding Officer not to allow Chhajju Ram, if he arrived, to work as his Polling Agent. And to our surprise the Presiding Officer Mr. K. C. Sharma, a Professor in the State Government College, also gave evidence in which he tried to support this story of Attar Singh. Professor Sharma was however hard put to explain why if Attar Singh had already warned him before Chhajju Ram's arrival, he received the form of appointment from Chhajju Ram and kept it with him after completing all the formalities required for allowing a polling agent to work. He could also offer no explanation of his report of the 11th January which in clearest terms stated that the polling agents whose forms of appointment had been sent on the 10th were the polling agents working on the 11th also. He could also refer to no writing anywhere to show that he had dealt with Chhajju Ram differently from the other candidates' polling agents by refusing to allow him to work. By section 48 of the Representation of People Act the revocation of the appointment of a polling agent is to be in writing signed by the candidate and according to rule 14(b) of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951 if there was revocation on the day of polling, as we are asked to believe in this case, the writing should have been lodged with the Presiding Officer. Professor Sharma cannot be heard to plead ignorance of this rule and the absence of any written revocation is only an additional circumstance indicating the falsity of this story that Chhajju Ram though appointed Polling Agent did not actually act. We may sympathise with Professor Sharma because

being a Government Servant he had to mould his evidence to support whatever case Minister Attar Singh chose to make, but we cannot see our way to believe him.

29. Ram Singh 6 R. W. 17 who was polling agent of Respondent Hari Singh at Nandha, states that Chhajju Ram worked as Polling Agent of Attar Singh on both the days. Ram Sarup 6 R. W. 10 also had seen Chhajju Ram working at Nandha on one of the days of polling. Even the petitioner's witness Piayre Lal P. W. 6 in cross examination affirmed that Attar Singh had a polling agent at Nandha though he did not know his name. We believe these witnesses in preference to Attar Singh and Professor Sharma and on issue 1(c) find it proved beyond doubt that Chhajju Ram a Government servant was appointed polling agent by Attar Singh and did act as such at Nandha Polling Station and that this amounted to corrupt practice under Clause (8) of S. 123 of the Representation of the People Act and on issue I (d) our decision is that in view of the commission of this corrupt practice the election of respondent No. 1 is liable to be declared void without the necessity of finding whether the result of the election was thereby materially affected or not.

30. *Issue II.*—No evidence was produced nor were we referred to anything in the return of election expenses of the Respondent No. 1 to satisfy us that in the making of that return the Respondent No. 1 could be deemed to have committed the minor corrupt practice specified in clause (4) of S. 124 of the Representation of the People Act. We find this issue in the negative.

31. *Issue V.*—Though proof of the material affection of the result of election was not necessary for declaring the election of the returned candidate as void, it becomes necessary to consider this in order to dispose of the claim of the petitioner for getting a declaration about himself as having been elected. The respondent No. 6 while otherwise claiming to support the petitioner's case was not willing to see the petitioner brought in the seat because of the knowledge that the petitioner was now lost to the congress party. The petitioner himself, though throughout the proceedings before us he conducted himself in a manner as to be helpful to the respondent No. 1 to be maintained in the seat, turned round at the argument stage and finding that respondent No. 1 by reason of the corrupt practice may have to go out and that respondent No. 2 by reason of his disqualification could not come in the seat, thought it was his chance to maintain his claim for the seat, because of his position in having secured third highest votes in the election. The matter is not, however, quite so simple as that the petitioner can automatically come in when the two candidates who secured more votes than himself have been eliminated. The grounds for which a candidate other than the returned candidate may be declared to have been elected as specified in S. 101 of the Representation of the People Act include the one relevant in this case, *viz.* that the Tribunal should be of opinion that but for the votes obtained by the returned candidate by corrupt or illegal practices the petitioner would have obtained a majority of valid votes. The votes obtained by Hari Singh would be treated as all thrown away because of the disqualification under which he laboured. Not so, however, with the respondent No. 1. In his case though for unseating him it was not necessary to assess how many votes he had secured by the commission of the corrupt practice of obtaining assistance of a government servant, it becomes necessary to determine this precisely in order to find, as required by the above provision of law, if after rejection of such votes, the votes secured by the petitioner would be more than the remaining valid votes of the respondent No. 1, and unless this is shown the petitioner could not be given the seat. No material has been produced before us in an attempt to lay foundation for the formation of such opinion by us because throughout the trial the petitioner was never in earnest about the seat. We accordingly find that the petitioner cannot be declared to have been elected.

32. *Issue VI.*—In the result, therefore, we make an order under S. 98 of the Representation of People Act declaring the election of the returned candidate Ch. Attar Singh respondent No. 1 from the Badra-Satnali Constituency to be void. Under S. 99(1)(a) (i) we record a finding that the corrupt practice of obtaining assistance of Government servant falling under clause (8) of S. 123 is proved to have been committed by the respondent No. 1 Ch. Attar Singh. This will entail on him disqualification under S. 140 of the Representation of People Act. We have not found any other persons connected with this corrupt practice who could be named under clause (ii) of S. 99(1)(a) for disqualification under sections 141 to 143 R.P.A. in respect of whom only the proviso in S. 99 would in our view be applicable. The costs incurred by the parties are scheduled below. We think it right in the circumstances of this case to order that the costs of the

respondent No. 6 Ram Kishan Gupta including Rs. 200 which we allow for pleader's fee if certified should be paid by the respondent No. 1 Attar Singh and that the other parties should be left to bear their own costs as incurred and we order accordingly.

SCHEDULE OF COSTS

Petitioner. Ch. Lahri Singh.	Respondent No. 1. Ch. Attar Singh.	Respondent No. 6. Ch. Ram Kishan.
1. Stamp for power of attorney and applications..... Rs. 4/-/-	1. Stamp for power of attorney and applications..... Rs. 1/2/-	1. Stamp for power of attorney and applications .....Rs. 9/-/-
2. Stamp for process fee.....Rs. 17/-/-	2. Stamp for process fee..... Rs. 20/-/-	2. Stamp for process fee Rs.22/8/-
3. Subsistence for witnesses. .... Rs. 10/-/-	3. Subsistence for witnesses..... Rs. 259/5/-	3. Subsistence for witnesses ..... Rs. 438/1/-
4. Pleader's fee .... Nil (No certificate filed.)	4. Pleader's fee.....Nil (No certificate filed.)	4. Pleader's fee..... Nil (No certificate filed.)
Total Rs. 31	Total Rs. 280/7/-	Total Rs 469/9/-

(Sd.) E. M. JOSHI,
Member

(Sd.) V. B. SARWATE,
Chairman

(Sd.) RAGHUNANDAN SARAN,
Member

Dated the 31st January, 1953.

ANNEXURE 'A'

BEFORE THE ELECTION TRIBUNAL, PATIALA.

ELECTION PETITION No. 214 OF 1952.

Ch. Lehri Singh, *Petitioner*

versus

Ch. Attar Singh and others.

ORDER

The only point which the Tribunal is called upon to determine at this stage is about the right of Respondent No. 6 in this petition to lead evidence in support of the grounds on which the election of Respondent No. 1 is being called in question by the petitioner. The Respondent No. 6, as a party to the petition, claims that he has such right and stresses the necessity of its exercise by him in this case because, according to him, the petitioner, for reasons of his own, is now indifferent to the proper prosecution of the petition and is holding back the available evidence in support of those grounds. There is no attempt on behalf of Respondent No. 6, to prove any grounds other than those urged in the petition.

The counsel for Respondent No. 1 objects to the Respondent No. 6, or, for that matter, any other Respondent leading evidence in support of the petition on the ground that no other person than the petitioner, who has challenged the election, has the right to give evidence against a Respondent who is declared successful at the elections.

We have heard the counsel on both sides at some length and considering the whole matter, we feel that the Respondent No. 6 can be allowed the right he claims in this case.

We think that the provisions in the Representation of the People Act, 1951, as regards election petitions are made with the purpose of ensuring that elections should be free and fair and that any, which are not found to have been so, should be set aside. The right to call the election in question is given not only to the persons who were actually in the contest but even to an elector, i.e., any person who is registered as a voter though he himself may not have voted at the election or otherwise interested himself in it (Section 81). The provision in Section 82

about making all persons respondents who, at any time, had concerned themselves with the election as candidates is with the purpose, as it seems to us, of giving them a chance to have a say at the trial of the petition so that the Tribunal may be in a position, at the trial, to get all facts relating to the election from all possible sources besides the petitioner and the returned candidate though only the returned candidate would be directly interested in opposing the petition.

The Tribunal is also given wide powers to collect all the necessary material in order that a fair and effectual trial of the petition may be had. We refer to Section 83(3) and Section 92 of the Representation of the People Act. In the latter Section, the Tribunal is given full powers to collect all material evidence and even to examine any person *suo motu* whose evidence appears to be material if the parties have failed to cite him. These provisions show that the Tribunal is left free to get the material evidence from all available sources as may be indicated by the parties and is not restricted to only looking at the evidence as the petitioner and the contesting Respondent, *i.e.* the candidate successful at the election, may choose to produce.

On behalf of Respondent No. 1, it was argued that the attempt of Respondent No. 6 to adduce evidence in this case is tantamount to recrimination against the successful candidate, Respondent No. 1, which the law does not allow and in support of the contention, that a Respondent cannot be permitted to adduce evidence of recrimination against a co-Respondent, the election case of Dattatraya Trimback Aradhye *Versus* Shamrao Pandurang Ligade and others. Indian Election Case, Vol. III, page 166, was cited. We think this decision has no bearing on the point which we have to decide in this case because what the Respondent No. 6 wants to do in this case is not recrimination as provided in Section 97 of the Representation of the People Act. Although in this case the petitioner has claimed the seat for himself, the Respondent No. 6 does not urge any grounds on which the petitioner's election would have been void if he had been declared elected. His case from the very start has been that the grounds on which the petitioner has challenged the election of Respondent No. 1, are good and he himself would be prepared to support them.

The question, therefore, is whether there is any provision in law under which he may be denied the right to support those grounds by leading evidence to prove them. The Respondent No. 1's counsel argued that the Representation of the People Act, 1951, does not anywhere confer such a right on a person in the position of Respondent No. 6 and so far as the provisions in the Civil Procedure Code are concerned, they are made applicable to the trial of an election petition subject to the provisions of the Representation of People Act as provided in Section 92. We do not find any provision in the Representation of the People Act debarring any Respondent other than the elected candidate from adducing evidence in support of the case which he seeks to make and therefore if the Civil Procedure Code gives to a party in his position the right to lead evidence and if that right will not be inconsistent with any provision in the Representation of the People Act, it should be available to the Respondent No. 6. On behalf of that Respondent, we were referred to Order 18, Rule 2, Civil Procedure Code, in sub-rule (2) of which it is provided that after the party, having the right to begin, has produced his evidence, "the other party" shall produce his evidence. What this phrase "the other party" means has been pointed out in the Bombay case of Haji Bibi *Versus* H.H. Sir Sultan Mohd Khan I.L.R. 32, Bombay 599, as that it means the party other than the one who has the right to begin and has begun. So where a defendant or a set of defendants support the plaintiff's case, they, according to this ruling, must immediately follow the plaintiff and call his or their witnesses and then the other set of defendants, who differ from the plaintiff, can be called upon to address the Court and produce their evidence. This is the procedure we are going to follow in this case, allowing the Respondent No. 6 to produce his evidence before the Respondent No. 1 will be required to produce his. This provision in the Civil Procedure Code does, in our view, support the Respondent No. 6 in his claim that under that code he has a right to adduce evidence though he is not opposing the petition.

That such right is reserved to a party joined as a Respondent to the petition may be inferred also from the provisions in Chapter IV of the Representation of the People Act as regards the procedure to be followed if the petitioner is found to be contemplating a withdrawal of the petition or when the petition is found to abate on his death. Any Respondent can, in such cases, claim to be substituted as a petitioner. This ensures that the grounds urged against election of the successful candidate are not to be left uninvestigated by the mere unwillingness or inability of the petitioner to prosecute the petition. The Tribunal is empowered in Section 110(2) to refuse an application for withdrawal if it appears to be induced by any

bargain or consideration which ought not to be allowed. The Legislature could not, therefore, have intended to leave the Tribunal powerless in the matter of having a fair and effective trial of the petition in order to determine if the election had been fair and free or not, when, as is alleged in this case, the petitioner, though not openly withdrawing the petition is trying collusively to keep back the available evidence for sustaining the grounds taken in the petition. To shut out reception of such evidence on the ground that it was being produced not by an allegedly unwilling petitioner but by one of the Respondents would be tantamount to encouraging such petitioner in his unhelpful attitude towards the Tribunal and in his attempt to prevent a fair and effectual trial of the election petition.

Another argument was that since there was no provision in the Act to require a person like Respondent No. 6 to furnish security before adducing evidence, it should be inferred that such a right was not intended to be given to him. We do not think it is legitimate to make any such inference. There is provision for securing Respondent No. 1 the extra costs, which he may have to incur in meeting the evidence which the Respondent No. 6 will be allowed to adduce. A Tribunal can make an order about such costs under Section 99 of the Act and they can be recovered under Section 122 of the same.

We, accordingly, hold that the Respondent No. 6 is entitled to produce evidence in proof of the grounds already made by the petitioner.

(Sd.) V. B. SARWATE, *Chairman.*
(Sd.) E. M. JOSHI, *Member.*
(Sd.) RAGHUNANDAN SARAN, *Member.*

Announced.
The 27th *October* 1952.

COPY OF THE ORDER PASSED BY THE TRIBUNAL ON 2ND FEBRUARY 1953 IN E P. No. 214/1952.

It is noticed that in this case there has been a clerical error in preparing the schedule of costs appended to the order which we delivered on the 31st January 1953. In the costs of respondent No. 6 no pleader's fee has been allowed and it is stated that no certificate was filed. Actually we now find that a certificate for Rs. 200 was filed on 12th January 1953 but was lost sight of. The schedule in the order is now corrected by including Rs. 200 for Pleader's fee of respondent No. 6 and by making the total of his costs as Rs. 669-9-0 instead of Rs. 469-9-0. The Election Commission to whom copies of the order have already been despatched will be intimated of this correction made in the schedule.

[No. 19/214/52-Elec.III.]

(Sd.) V. B. SARWATE, *Chairman.*
(Sd.) E. M. JOSHI, *Member.*
(Sd.) RAGHUNANDAN SARAN, *Member.*

S.R.O. 285.—WHEREAS the election of Shri Sheo Bhajan Singh, as a member of the Legislative Assembly of the State of Bihar from the Jehanabad Constituency of that Assembly has been called in question by an election petition (Election Petition No. 215 of 1952 before the Election Commission) duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951) by Shri Fida Hussain S/o Syed Abdul Aziz, Jehanabad, District Gaya (Bihar);

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of Section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in Section 103 of the said Act, sent a copy of its Order to the Election Commission;

NOW, THEREFORE, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said order of the Tribunal.

IN THE COURT OF THE ELECTION TRIBUNAL, HAZARIBAGH

PRESENT:

Mr. S. B. Sengupta—*Chairman.*

Mr. Govind Saran—*Member.*

Mr. Nirmal Krishna Ghose—*Member.*

(In the matter of election case to the Bihar Legislative Assembly, 1952 from Jehanabad Constituency, District Gaya, State of Bihar.)

Fida Hussain—*Petitioner.*

Versus

1. Sheo Bhajan Singh.
2. Md. Ishaque.
3. Kedar Nath Sandil.
4. Thaneshwar Prasad Singh
5. Murlidhar Khaitan.
6. Sham Narain Singh.
7. Mathura Das—*Respondents.*

JUDGMENT OF MR. S. B. SENGUPTA, CHAIRMAN AND MR. N. K. GHOSE, MEMBER.

This is an election petition filed by Mr. Fida Hussain for declaration of the election of Sheobhajan Singh (respondent No. 1) to the Bihar Legislative Assembly from Jehanabad Constituency as void and also for declaration that the petitioner has been duly elected. The petition is opposed by respondent No. 1 Sheobhajan Singh on various grounds. One of the grounds is that Shree Harihar Garain and Shree Rajeshwari Prasad whose nominations were accepted by the Returning Officer under section 36 and who withdrew their candidatures thereafter under section 37 of the Representation of the People Act, 1951 have not been made respondents in the election petition, which is therefore not maintainable and shall be dismissed for their non-joinder as respondents. In this connection a preliminary issue has been framed as follows:—

Issue No. 4.—Is the election petition for non-joinder of Shree Harihar Garain and Shree Rajeshwari Prasad as parties to the election petition?

The petitioner has also filed a petition for amendment of the election petition by adding the aforesaid candidates as respondents in the petition. We are therefore also to consider if this amendment petition shall be allowed. It is important to note that if these points be decided against the petitioner, it will not be necessary to enter into and decide other issues framed in the case.

It is undisputed that the aforesaid candidates' nominations were accepted by the Returning Officer after scrutiny under section 36 and the candidates thereafter withdrew their candidatures under section 37 of the Act and their names were not published in the list of "*valid nominations*" under section 38 of the Act.

The points which arise in this connection are covered by section 82 of the Act. Section 82 runs as follows:—

> "A petitioner *shall* join as respondents to his petition *all* the candidates who were *duly nominated* at the election—other than himself if he was so nominated."

In the application of section 82, stress is to be laid on the words *shall, all* and *duly nominated,* used in this section.

Three points arise for determination in this connection.

Point No. 1.—The first point is—whether a candidate whose nomination has been accepted under section 36, but who withdraws his candidature thereafter under section 37 and whose name does not therefore appear in the list of *valid nominations,* published under section 38, comes within the term "*duly nominated*" used in section 82.

It is contended on behalf of the petitioner that the term "*duly nominated*" includes only those candidates whose names have been published in the list of *valid nominations* under section 38 and does not include those candidates whose nominations have been accepted under section 36, but who have withdrawn their candidatures under section 37.

We do not agree to this contention. In the Act a distinction has been made between the term *"duly nominated"* and the term "valid nomination" (or *"validly nominated"*) used in section 38. The term *"duly nominated"* is a wider term than the term *"validly nominated"*. The term *"duly nominated"* means all candidates whose nominations have been accepted by the Returning Officer after scrutiny, under section 36; it therefore includes·

(1) all nominated candidates who withdrew their candidatures under section 37 and

(2) all nominated candidates who do not withdraw their candidatures under section 37 and whose names are published in the list of *valid nominations* under section 38.

The distinction between the two terms will be clear, if one carefully goes through the relevant sections relating to nomination, *i.e.*, sections 33, 34, 36, 37, and 38. Sections 33, 34 and 36 relate to nomination up to the stage when the nomination is accepted after scrutiny, under section 36, and not thereafter. The term *"duly nominated"* has been used thrice in section 33 thus:—

1. In sub-section (3) ".....no candidate shall be deemed to be *duly nominated* unless such declaration is, or all such declarations are, delivered along with the nomination paper."
2. In the second proviso of this sub-section "..... no candidate shall be deemed to be *duly nominated* for the seat so reserved unless the nomition paper is accompanied by a declaration ....."
3. In the third proviso of this sub-section: "..... such person shall not be deemed to be *duly nominated* as a candidate unless his nomination paper is accompanied by a certificate....."

This term has also been used in section 34, which runs thus:—

"Deposits:—(1) A candidate shall not be deemed to be duly nominated unless he deposits....."

The term has again been used in section 36, sub-section (3), thus:—

"..... if the candidate has been *duly nominated* by means of another nomination paper in respect of which no irregularity has been committed."

The use of the term *"duly nominated"* in sections 33, 34 and 36 (quoted above) clearly goes to prove that the term includes all those candidates whose nominations have been accepted after scrutiny under section 36, irrespective of the question whether such nominated candidates withdraw their candidatures thereafter, under section 37.

The distinction between the two terms, *"duly nominated"* and *"validly nominated"*, and their meanings have been clearly brought out and emphasises in the definition of the term *"validly nominated candidate"* in Rule 2 relating to INTERPRETATIONS in the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951. Rule 2 clause (f) runs thus:—

"validly nominated candidate" means a candidate who has been *duly nominated and has not withdrawn his candidature* in the manner and within the time specified in sub-section (1) of section 37 or in that sub-section read with sub-section (4) of section 39, as the case may be.

Section 38 also brings out the distinction between the two terms very clearly. Section 38 runs thus:—

"Publication of nominations.—The Returning Officer shall, immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (1) of section 37, prepare and publish a list of *valid nominations* in such manner as may be prescribed."

Section 38 relates to nomination after the acceptance of the nomination paper under section 36 and after withdrawal of the candidature under section 37. But in section 38, the term "duly nominated" has not been used; the term used is *"valid nomination"*.

There cannot be any manner of doubt, therefore that a *validly nominated* candidate, as distinguished from a *duly nominated* candidate, means only those duly nominated candidates who have not withdrawn their candidatures and whose names have been published in the list of valid nominations under section 38. But a duly nominated candidate means all those candidates whose nominations have been

accepted after scrutiny under section 36 and therefore includes (1) those duly nominated candidates who withdraw their candidatures thereafter under section 37 and (2) also those duly nominated candidates who do not withdraw their candidatures thereafter under section 37.

It is significant to note that in section 82, the words used are "*all* the candidates who were *duly nominated* at the election" and the words "*and* have not withdrawn their candidature" have been deliberately omitted from section 82. The term 'validly nominated" has also not been used in section 82.

In connection with one election petition on this point, it has been argued before us that the words, "*and has not withdrawn his* candidature" used in the definition of a validly nominated candidate in Rule 2(f) of the Representation of the People Rules, 1951 (quoted above), are redundant and form a tautologous expression and that '*validly nominated*' and '*duly nominated*' are interchangeable terms and have the same meaning and include only those candidates who have not withdrawn their candidatures under section 37 and whose names have been published in the list of *valid nominations* under section 38; *i.e.*, only those candidates who actually "go to the polls". In support of this argument our attention is drawn to sections 52 and 53 of the Act. This argument is clearly wrong. As stated above, the Act has made a clear distinction between the two terms *duly nominated* and *validly nominated*. The use of the words "*and has not withdrawn his candidature*" in the definition of a *validly nominated* candidate in Rule 2 (f) has been made with deliberate care; the words are not redundant. This will also be clear from sections 52 and 53 to which our attention has been drawn. Section 52 relates to "Death of candidate before poll", *i.e.* the section comes into operation "if a candidate who has been duly nominated under this Act dies *after* the date fixed for the scrutiny of nominations". Such deaths may occur either

(1) before the expiry of the period within which candidatures may be withdrawn under section 37, or

(2) after the expiry of such period.

If death occurs before the expiry of the period within which candidatures may be withdrawn, the candidate may die, though after the acceptance of his nomination after scrutiny under section 36, but before he could exercise his option to withdraw or not to withdraw under section 37. Such a candidate cannot be described as one who has been duly nominated and *has not withdrawn his candidature;* he shall be described as a candidate who has been duly nominated and the words "has not withdrawn his candidature cannot be added to it. The death of such a candidate would come under the purview of section 52. The death of a candidate contemplated in section 52 does not therefore necessarily mean the death of a candidate who had opportunity to exercise his option to withdraw under section 37 before his death and who has not withdrawn his candidature. So the expression "and has not withdrawn his candidature" has been deliberately omitted from section 52. But section 53 relates to "Procedure in contested and uncontested elections". Necessarily therefore it relates to only those candidates who have been duly nominated and *who have not withdrawn their candidatures*, i.e. to those who actually "go to the polls". Consequently the expression "who have not withdrawn their candidatures' under section 37 has been deliberately used in section 53. The two sections 52 and 53 therefore clearly bring out the distinction between the two terms, *duly nominated* and *validly nominated*, as discussed above.

Our attention has also been drawn to the earlier Rules framed under the Government of India Act, 1935, in this connection. But in the earlier Rules there does not appear to have been any distinction made between the two terms, *duly nominated* and *validly nominated*. But the distinctions between the two terms being clear in the present Act and the term used in Section 82 being *duly nominated* and not *validly nominated*, there cannot be any doubt that the term *duly nominated* used in section 82 means all candidates whose nominations were accepted after scrutiny under section 36, irrespective of the question whether such duly nominated candidates withdrew their candidatures thereafter under section 37.

We have therefore no doubt that the term "*all the candidates who were duly nominated*" used in section 82 means all the candidates whose nominations were accepted after scrutiny under section 36 and it includes those candidates also, who, after the acceptance of their nominations under section 36, withdrew their candidatures under section 37. This term also includes those candidates who, after the acceptance of their nominations after scrutiny under section 36, have not withdrawn their candidatures under section 37. It is this latter class of duly nominated candidates only, who are called *validly nominated* candidates whose names are published in the list of *valid nominations* under section 38. According to the contention of the petitioner, the term "*duly nominated*" used in section 82 means only this latter class of nominated candidates whose list is published in the list of *valid nominations* under section 38. That is, according to his contention,

the term *"duly nominated"* used in section 82 means "validly nominated". If his contention were correct, either the term *validly nominated* instead of the term *"duly nominated"* would have been used in section 82 or the words *"and have not withdrawn their candidatures"* would have been added after the words "duly nominated" in section 82 (as has been done in the definition of a *"validly nominated candidate"* in Rule 2 (f) of the Representation of the People Rules, 1951, (quoted above). The fact that this was not done conclusively shows that the contention of the petitioner is not correct.

Clearly therefore, a candidate whose nomination paper has been accepted after scrutiny under section 36, but who has thereafter withdrawn his candidature under section 37, comes within the term *"duly nominated"* and falls within the purview of section 82; and under section 82 such a duly nominated candidate shall be joined as a respondent in the election petition, by the petitioner. Consequently the aforesaid candidates who were duly nominated and who withdrew their candidatures thereafter under section 37, are *necessary* parties to the election petition under section 82.

Point No. 2.—The second point which then arises is whether in the absence of the aforesaid candidates being made respondents in the election petition, the election petition is maintainable or is liable to be dismissed.

From the wordings of section 82 it is clear that the section is mandatory. Here we lay special emphasis on the word *"shall"* used in this section. The Representation of the People Act, by its very nature, should be strictly construed. It will be noted that throughout this Act the two words *"shall"* and *"may"* have been used with great care, keeping the distinction between the meanings of the two words clearly in view. Wherever the word *"shall"* has been used, it means that the provision in which the word occurs is imperative and of a mandatory nature. Whenever the Parliament have thought fit to qualify the mandatory nature of a provision conveyed by the word *"shall"*, it has been done by adding a proviso or a sub-section, or a separate section. As for example, the provisions of sub-sections 1 and 2 of section 83 are mandatory, the word *"shall"* having been used in both the sub-sections. But the mandatory nature of these two sub-sections have been qualified in their application, so far as the Election Tribunal is concerned, by the addition of sub-section (3) by which it has been provided that the Tribunal *"may"* allow the particulars included in the list [mentioned in sub-section (2)] to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished. But there is no such proviso or sub-section or separate section to qualify the mandatory nature of section 82. Section 82 being thus mandatory, it is *incumbent* upon the petitioner to join as respondents to his petition all the candidates who were duly nominated at the election. The petitioner has no option nor discretion in the matter. From the mandatory nature of section 82 it necessarily follows that non-compliance with its provision is fatal. The provision for dismissal for non-compliance of a section of a mandatory nature is inherent in the section itself Any separate provision for dismissal for non-compliance of a mandatory section is unnecessary and would be superflous.

In this connection it is pointed out on behalf of the petitioner that there are provisions in the Act for dismissal of an election petition. These provisions are to be found in section 85, which applies to the Election Commission, and in section 90 sub-section (4), which applies to the Election Tribunal. Under section 85 the Election Commission *shall* dismiss an election petition if the provisions of sections 81, 83 or 117 are not complied with. Section 90 sub-section (4) lays down:—

> "Notwithstanding anything contained in section 85 the Tribunal *"may"* dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

It is further pointed out on behalf of the petitioner that in section 85 or in section 90 sub-section (4) there is no provision for dismissal of an election petition for non-compliance with the provision of section 82 and there are no other provisions in the Act for the dismissal of the election petition on that ground. It is, therefore, contended that section 82 has been deliberately omitted from section 85 and section 90 sub-section (4) and it follows therefrom that non-compliance with section 82, *i.e.*, the failure on the part of the petitioner to make a duly nominated candidate a respondent in the election petition, is not fatal to the maintainability of the petition which can proceed in the absence of such a candidate being made a party.

We do not agree to this contention. We agree that the omission of section 82 in section 85 and in section 90 sub-section (4) is *deliberate*. The omission is not

only deliberate, but it is *significant*. It is true that sections 83 and 117 are mandatory, the word "*shall*" having been used in these sections; the provision in section 81 on the point of limitation is also mandatory. But the Parliament have thought fit to qualify the mandatory nature of these sections so far as the Election Tribunal is concerned, but not so far as the Election Commission is concerned. Hence the necessity for enacting section 85 and section 90 sub-section (4). By section 90 sub-section (4) a discretion has been given to the Election Tribunal to dismiss an election petition for non-compliance with section 81, section 83 or section 117 and the word "*may*" has been used in it. But this discretion having been denied to the Election Commission, enactment of section 85 was necessary. In section 85 also the mandatory nature of section 81, so far as the question of limitation is concerned, has been qualified by giving a discretion to the Election Commission by adding a proviso that the condone the delay in presenting an election petition after the expiry of the period of limitation, on sufficient cause being shown. Thus section 85 and section 90 sub-section (4) further illustrate our point of view that the word "shall" has always been used in the Act to imply the mandatory nature of the provision in which it occurs. But the deliberate omission of section 82 from section 85 and section 90 sub-section (4) clearly goes to show that the provision of this section 82 remains absolute and unqualified in its application by both the Election Commission and the Election Tribunal. The necessary conclusion therefore is that for non-compliance of the provision of section 82 *i.e.*, for the failure of the petitioner to join the aforesaid candidates as respondents, the Election Commission and the Election Tribunal are not only empowered, but are bound to dismiss the election petition.

It will be further noted that under section 80,

> "No election *shall* be called in question except by an election petition presented in accordance with the provisions of this Part."

The plain meaning of this carefully worded section 80 is that if the election petition is not presented in accordance with the provisions of Part VI, the election petition shall be dismissed. This section 80 is also mandatory and applies equally to the Election Commission and to the Election Tribunal. It not only empowers, but it makes it *obligatory* on both the Election Commission and the Election Tribunal to dismiss the election petition. Reading the two sections 80 and 82 together we find that the Election Commission and the Election Tribunal are bound to dismiss an election petition if it fails to comply with the provision of section 82. Neither the Election Commission nor the Election Tribunal has any discretion to proceed with the election petition, if it does not comply with the provision of section 82.

There is a further provision for the dismissal of an election petition by the Election Tribunal, which is to be found in section 98 of the Act. Section 98 runs thus:—

> "At the conclusion of the trial of an election petition the Tribunal shall make an order:—
>
> (a) dismissing the election petition; or
>
> (b) declaring the election of the returned candidate to be void; or
>
> (c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or
>
> (d) declaring the election to be wholly void."

It has been argued on behalf of the petitioner that the word "conclusion" used in section 98 means *that* stage of the trial which comes after the recording of the evidence and that therefore under this section 98 an Election Tribunal cannot dismiss an election petition only on the ground of non-compliance with the provision of section 82 before entering into evidence on the merits of the election petition. We are unable to accept this interpretation of the word "conclusion". The term "*conclusion of the trial*" used in section 98 means the stage when the election petition can be finally disposed of and the trial can therefore be concluded. That which concludes the trial is "the conclusion of the trial." We therefore hold that when we find that for the failure to comply with the provision of section 82 the election petition is not maintainable and for this fatal defect the election cannot be called in question under section 80, the Election Tribunal can dismiss the election petition under section 98 also, as the fatal defect occurring in the election petition concludes the trial.

There cannot be any difference of opinion on the point that the term "all the candidates who have been duly nominated" used in section 82 concludes the *returned* candidate. Now let us take an extreme example. Suppose, the returned

candidate has not been made a respondent in the election petition. Because there is no specific provision for dismissal of an election petition for non-compliance of section 82, as contended on behalf of the petitioner, would it follow that in the absence of the returned candidate whose election is sought to be set aside the election petition would be maintainable and could proceed? This is simply absurd. Failure to make the returned candidate a respondent in the election petition is fatal, and both the Election Commission and the Election Tribunal are bound to dismiss an election petition for such failure.

In this connection it has been argued that a returned candidate stands on a different footing from the other 'duly nominated' candidates. It is contended that the candidates in question having withdrawn their candidatures under section 37, they ceased to have any interest in the election which took place thereafter and they expressed their unconcern to the election by the withdrawal of their candidatures; these candidates are therefore not affected at all by the trial of the election petition in their absence; and therefore in the absence of those duly nominated candidates who have withdrawn their candidatures, the election petition is maintainable and can proceed. If this contention of the petitioner were correct, then the term *"validly nominated* candidates" or the term *"duly nominated candidates who have not withdrawn their candidatures"* would have been used in section 82 instead of the term *"duly nominated"*. We have already discussed this point.

It has also been argued before us in connection with some of the election petitions that where the petitioner does not claim a declaration that he himself has been duly elected, but simply calls in question the election of the returned candidate, the candidates in question who have withdrawn their candidatures and the defeated candidates also are not *necessary* parties and the election petition is maintainable and can proceed in their absence. If this contention of the petitioner were correct, then the Parliament must have made separate provisions regarding joinder of respondents for different kinds of election petitions praying for different kinds of reliefs. But this has not been done, as is evident from the wordings of section 82, which uniformly applies to all kinds of election petitions praying for all kinds of reliefs.

In this connection it is necessary to refer to the earlier Rule framed under the Government of India Act, 1935. The Rule framed under the Government of India Act, 1935, corresponding to the present section 82 of the Representation of the People Act, 1951, ran thus:—

> "If a petitioner in addition to calling in question the election of a returned candidate claims a declaration that he himself has been duly elected, he shall join as respondents to his petition all other candidates who were nominated at the election."

It will be noted that in the earlier Rule, in cases where the petitioner merely called in question the election of the returned candidate, it was *not incumbent* upon him to join as respondents all the candidates who were nominated at the election. But in cases where the petitioner claimed a declaration that he himself had been duly elected, the earlier Rule and the present section 82 are exactly the same. But in the present section 82 this distinction between the two different kinds of cases has been done away with; and under the new section 82 it is *incumbent* upon the petitioner in *all cases* to join as respondents *all* the candidates, who were duly nominated at the election. This deliberate change made in section 82 on the point of joinder of respondents, by providing that in both kinds of cases the petitioner shall join as respondents *all* the candidates who were duly nominated, clearly goes to show that the intention of the Parliament in framing section 82, as it is, is to make it *obligatory* upon the petitioner to make *all* the candidates, who were duly nominated, as respondents in the election petition, whatever might be the prayer of the petitioner.

We therefore find that under section 82 all the candidate who were *"duly nominated"* have been placed on the same footing; the same principle applies to a returned candidate, a defeated candidate and any other duly nominated candidate, whatever may be the relief claimed in the election petition. In section 82, no distinction has been made amongst different classes of *"duly nominated"* candidates on the point of joinder of respondents. In view of the clear provision of section 82, the Tribunal is debarred from making any such distinction amongst the different classes of duly nominated candidates on this point. As clearly the absence of the returned candidate makes an election petition inadmissible and liable to dismissal, so the absence of any other duly nominated candidate from the election petition would make it equally inadmissible and liable to dismissal. The candidates in question being found to come within the term *"duly nominated"* and therefore

within the purview of section 82, the failure on the part of the petitioner to make the aforesaid candidates as respondents in the petition is fatal to its maintainability and the election petition must therefore be dismissed. The election petition cannot proceed or be enquired into, in the absence of the candidates in question.

Point No. 3.—The third and last point which arises is whether the aforesaid candidates can be added as respondents and whether the amendment petition filed by the petitioner to that effect can be allowed.

In this connection it is pointed out on behalf of the petitioner that under section 90 any other candidate, who has not been joined as a respondent in the election petition, is entitled to be joined as such. It is therefore contended on behalf of the petitioner that the aforesaid candidates can now be joined as respondents and the amendment petition filed by the petitioner to that effect should be allowed.

We do not agree to this contention also. The petitioner cannot certainly invoke the aid of section 90 in his behalf. Under section 90, any other candidate can, of his *own motion,* join as a respondent on certain terms and under certain conditions only. Such a candidate must apply within fourteen days from the publication of the election petition in the Official Gazette and he must also give such security for costs as the Tribunal may direct. Section 90 is obviously meant for the benefit of other candidates and not for the benefit of the petitioner. So section 90 is of no avail to the petitioner.

It has also been argued that under section 90 sub-section (2) the provisions of Civil Procedure Code as to joinder of parties shall be applicable here. Section 90 sub-section (2) runs thus:—

> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908), to the trial of suits."

This sub-section itself lays down that the provisions of the Civil Procedure Code are subject to the provisions of the Representation of the People Act, 1951 and the Electoral Rules made thereunder. It is therefore necessary to examine carefully the provisions for joinder of defendants in the Civil Procedure Code and compare them with the provision of section 82 of the Act. The provisions of the Civil Procedure Code on this point are to be found in Order 1, Rules 3, 6, 9 and 10. Order 1 Rule 3 runs thus:—

> "All persons *may* be joined as defendants against whom any right to relief..... is alleged to exist....."

Order 1 Rule 6 runs thus:—

> "The plaintiff *may* at his *option* join as parties to the same suit all or any of the persons severally, or jointly and severally, liable to any contract....."

From the wordings of these two Rules and specially from the use of the word *may* in them, it is clear that these Rules are not imperative and are merely directory; and a plaintiff is *not bound* to join all persons as defendants, whom he *may* do so if he chooses. The non-imperative nature of these Rules has been clearly brought out in Order 1 Rule 9, which runs thus:—

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court *may* in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

These three Rules are, therefore clearly in conflict with the provision of section 82 of the Act we are dealing with, which lays down that it is *obligatory* upon the petitioner to join as repsondents *all* the candidates who were duly nominated at the election. This conflict, by the way, further emphasises the mandatory nature of section 82. The clear provision of section 82 therefore shows that the Rules regarding joinder of defendants of the Civil Procedure Code cannot be applied to election petitions.

We should further note that if all the provisions of the Civil Procedure Code regarding amendment of pleadings were applicable to an election petition it was not necessary for the Parliament to enact sub-section (3) of section 83, which sub-section provides that the Tribunal may allow the particulars included in the "list" to be amended or order such further and better particulars in regard to any matter

referred to therein, to be furnished. The enactment of the specific rule regarding amendment made in sub-section (3) of section 83 also goes to show clearly that the Rules regarding amendment of pleadings made in the Civil Procedure Code are not applicable to election petitions.

We therefore hold that under the Representation of the People Act, the Tribunal has no power to add new candidates, who were duly nominated at the election but have not been joined as respondents in the original election petition.

In connection with one election petition on this point it has been argued before us that when the Tribunal finds that, in the absence of the aforesaid candidates being made respondents in the election petition, the election petition cannot be gone into, the Tribunal shall invoke the aid of Order 1 Rule 10 of the Civil Procedure Code and, of *its own motion*, add those candidates as respondents. For the reasons stated above this Rule regarding addition of parties contained in Order 1 Rule 10 of the Civil Procedure Code cannot be applied to an election petition. The discretion given to a plaintiff regarding joinder of defendants under Order 1 Rules 3 and 6 of the Civil Procedure Code makes it necessary for the framing of Order 1 Rule 10 of the Code. But section 82, by laying down that it *is incumbent* upon the petitioner to join as respondents *all* the duly nominated candidates in all cases precludes the possibility of any scope for addition of respondents and for application of Order 1 Rule 10 of the Civil Procedure Code by the Tribunal, either at the instance of the petitioner or of its own motion. We should add in this connection that under section 92 of the Act:—

> "The Tribunal shall have the *powers* which are *vested* in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters:—
>
> (a) discovery and inspection;
>
> (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
>
> (c) compelling the production of documents:
>
> (d) examining witnesses on oath:
>
> (e) granting adjournments;
>
> (f) reception of evidence taken on affidavit; and
>
> (g) issuing commissions for the examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to it to be material ... ."

If all the provisions of the Civil Procedure Code were applicable to the trial of an election petition under section 90 sub-section (2), section 92 would be altogether superfluous. The framing of section 92 clearly shows that, apart from mere *rules of procedure*, the Civil Procedure Code *vests* a Court with certain *powers* in conducting the trial of a case and such powers given under the Code of Civil Procedure are not to be applied in the trial of election petitions except where special provision to that effect has been made in the Act. It is only with regard to matters enumerated in section 92 of the Act that the Tribunal has been vested with powers given under the Civil Procedure Code. It will be noted that in clause (g) of section 92 it has been provided that the Tribunal may summon and examine any person *suo motu*. If the provision of Order 1 Rule 10 Civil Procedure Code empowering a Court to add parties to a suit *suo motu* were applicable to an Election Tribunal, there must have been a specific provision for it in the Act or it must have been included in section 92 of the Act. The fact that this was not done is an additional ground to show that the Tribunal has not been given any power to add any candidate as a respondent, either of its own motion or at the instance of the petitioner.

Question of limitation will also arise in connection with the petitioner's application for amendment of the election petition by adding new candidates as respondents. Would the petitioner be allowed to add new candidates as respondents at any stage? Under section 90, any other candidate has the right to apply for being a respondent within fourteen days from the publication of the election petition in the Official Gazette. There are certain time limits fixed for the presentation of election petitions before the Election Commission, under Rule 119 of the Representation of the People Rules, 1951. Those periods of limitation passed long ago. Under section 85 of the Act Election Commission has been given power to extend the period of limitation for presentation of an election petition on sufficient cause being shown. No such power has been given to the Election Tribunal. Addition of candidates as respondents at any stage after the

election petitions are referred to the Election Tribunal by the Election Commission, would therefore completely nullify the effect of the provisions made for fixing the time limits for presentation of election petitions to the Election Commission.

To clarify the question of limitation let us take the same extreme example. Suppose, the petitioner did not make the *returned* candidate a respondent in the original petition presented to the Election Commission. After the expiry of the period of limitation for presenting such election petition to the Election Commission and after the election petition is referred to the Election Tribunal, can the Election Tribunal, permit the petitioner to join the returned candidate as a respondent in his petition? Certainly no. The same principle would therefore apply where the petitioner wants any other duly nominated candidate to be joined as a respondent.

It is important to note that Order 1 Rule 10 of the Civil Procedure Code for addition of parties is subject to the law of limitation, as laid down in sub-rule (5) of that Rule. It is well settled that under the Civil Procedure Code if any person is a *necessary* party to the suit, that is if the suit will not be a properly constituted one, unless he is made a party, he cannot be added as a party on any ground after the period of limitation for the institution of such a suit; his addition after the period of limitation will entail the dismissal of the whole suit inasmuch as the suit becomes a properly constituted one only when he is made a party, and inasmuch as at that time the suit is barred against all. Here, under the provision of section 82 the candidates in question are necessary parties and unless they are added the election petition is not a properly constituted petition under the Act. The period of limitation for presenting the election petition having expired long ago, the candidates in question cannot be added as respondents at this stage, even if the provisions of Order 1 Rule 10 of the Code of Civil Procedure were applicable here.

On the the point of limitation also, any other duly nominated candidate, who has not been joined as a respondent in the original election petition, cannot be joined as a respondent at this stage and the petitioner's application for amendment of the election petition to that effect cannot be allowed.

The aforesaid candidates cannot therefore be joined as respondents by the Tribunal, either of its own motion or at the instance of the petitioner and the petition for amendment filed to that effect must be dismissed.

The result therefore is that the non-joinder of the aforesaid candidates as respondents in the original election petition is a fatal, irremediable defect, for which the entire election petition must be dismissed. It would not therefore be necessary to enter into and decide other issues raised in the case.

(Sd.) S. B. SEN GUPTA, *Chairman.*

(Sd.) N. K. GHOSE, *Member.*

The 29th January 1953.

JUDGMENT OF MR. G. SARAN, A MEMBER OF THE TRIBUNAL.

This election petition has been filed by Mr. Fida Hussain, a candidate for election to the Bihar Legislative Assembly, from Jehanabad Constituency in Gaya District.

The returned candidate at the election was Shree Sheo Bhajan Singh and the petitioner on various grounds has sought for the declaration that the election of Shree Sheo Bhajan Singh was void and that he himself had been duly elected.

At this stage the election petition had been heard on preliminary issue, namely, whether the election petition was vitally defective under section 82 of the Representation of the People Act, 1951 and therefore not maintainable on account of Shree Harihar Narain and Shree Rajeshwari Prasad, two of the duly nominated candidates at the election who had subsequently withdrawn their candidatures under section 37 of the Representation of the People Act, 1951, not being made the parties as respondents.

The petitioner Mr. Fida Hussain in connection with the said plea of non-joinder filed an application in the case to add as respondents the said two nominated candidates named. So this was the second point in the case and it has to be considered if the candidates could be added as the respondents at this stage.

As to the first point that the election petition was not maintainable for the non-joinder of duly nominated candidates, it was urged on behalf of the petitioner that the candidates in question, Shree Harihar Garain and Shree Rajeshwari Prasad by their withdrawal ceased to hold the position of candidates . Reference in this

connection was also made to section 38 of the Representation of the People Act and Rule 11 framed thereunder which provided for the publication of the names of the duly nominated candidates, who remained to go to the polls after the withdrawal under section 37 of the Act and it was said that it was not necessary to make parties in the election petition those who had no interest in the election and had no position as candidates.

But a candidate has been defined in clause (b) of section 79 of the Representation of the People Act in a very comprehensive way to include all those who had been or claimed to be duly nominated candidates As will be shown later more specifically, every candidate in the comprehensive sense including those who had withdrawn, had the right to appear if they so desired and made the respondents after the publication of election petition under section 90 of the Act by the Tribunal. It could not therefore be said that by withdrawal a candidate effaced himself completely and ceased to be such. The same is shown by also section 76 of the Act under which all the nominated candidates including those who may have subsequently withdrawn remain liable to submit the Return of the election expenses and in this behalf in another case before this Tribunal where a similar question had arisen, the contesting respondent filed the copy of Bihar Gazette (Extraordinary), dated 16th May, 1952, which showed candidates of Barhi Constituency in Hazaribagh District who had withdrawn to have submitted the Return of election expenses.

Therefore by withdrawal a candidate did not efface himself completely and by the literal meaning and from the basic intention underlying the Act, particularly section 90 which gave in a general way right to all nominated candidates to appear after the publication of the election petition in the Gazette by the Tribunal, it follows that the candidates who had withdrawn did also come within the term "duly nominated candidates" used in section 82. If they had right under section 90 to appear at the later stage very reasonably the Legislature could have intended them to be made parties even at the earlier stage to obviate the delay resulting from their possible appearance and on a review of the general scheme and provisions in the Act and the general terms of the section it very clearly appears that the duly nominated candidates, who have withdrawn, were also intended to be made parties under section 82.

Rules framed for the conduct of election under the present Act has made the matter even more abundantly clear and in clause (f) of Rule 2 the nominated candidates who remained for contest at the polls after withdrawal have been separately defined there as validly nominated candidates. Such distinction has been indicated in the Act itself also in section 38 and speaking of the publication of the names of the candidates who remained for contest at the polls, the section also uses in connection therewith the term "valid nomination".

The Tribunal at Rewan in the election case of the petitioner Keshab Prasad appears from the copy of the judgment filed here to have given a limited meaning to section 80 of the Act and to have held that the candidates who had withdrawn under section 37 of the Act did not come within the terms of section 82 and such candidates were not needed to be made respondents in an election petition. But there was no unanimity of decision on the point and in the election case of the petitioner Pritam Singh the copy of the judgment of which was filed in another case here the Tribunal at Lacknow held the nominated candidates who had withdrawn, to be within the scope of section 82 and as such required to be made respondents in the election petition. Even at Rewan the judgment given was not unanimous but of the majority and one of the members Mr. Sribastav taking different view held the nominated candidates who had withdrawn as required to be made respondents under section 82 of the Act.

Hence with all respects I can not agree with the view taken by the Tribunal at Rewan and taking into consideration the broad terms of section 82 and the general scheme and the provisions in the Act I hold that the duly nominated candidates Shree Harihar Garain and Shree Rajeshwari Prasad who had withdrawn their candidatures came within the terms of section 82 of the Act and were generally required to be made respondents in the election petition.

But this does not settle the question arising in the case. It still remains to be considered whether the failure of compliance to implead Badri Narain and others who withdrew their candidatures will entail and result in the dismissal of the election petition.

As to this the returned candidate Shree Sheo Bhajan Singh who contested in the case has emphasised on the word "shall join" in section 82 of the Representation of the People Act and further referred to section 80 of the Act which lays down that no election shall be called in question except by an election petition

presented in accordance with the provision of this part (meaning part VI which deals with the election dispute). It was accordinly urged that provision in section 82 and as a matter of fact every provision in the Act was mandatory and that non-compliance and failure to implead Shree Harihar Garain and Shree Rajeshwari Prasad the duly nominated candidates, must entail and result in the dismissal of the election petition.

But it will be important to refer to section 85 and clause (4) of section 90 of the Act. The former section 85 provides for the dismissal of election petition by the Election Commission and the latter clause (4) of section 90 that by the Tribunal. In both there is mention of the same three sections 81, 83 and 117 and of these the first section 81 by reference to the Rules made under the Act defines the period within which the election petitions were to be filed. Section 83 speaking of the form of the election petition provides that it must contain explicit material fact and full particulars regarding corrupt and illegal practices and be properly varified by the petitioner. Section 117 speaks of the security for costs which the petitioner was required to deposit while filing the election petition. Neither section 85 nor clause (4) of section 90 makes mention of section 82 and except in a very remote way as was done on behalf of the contesting respondent by reference to section 80 there is no provision anywhere in the Act to suggest that an election petition should fail for non-joinder of a duly nominated candidate and the non-compliance of section 82 would have the far-reaching consequence as urged. This omission was significant and on reasonable grounds it gives an indication that ipso facto failure of an election petition without any further consideration was not contemplated as a consequence for the non-compliance in the matter of the joinder of a duly nominated condidate.

Section 90 of the Act referred to above has also importance in this behalf. Giving the right to appear after the publication of the election petition in the Gazette by the Tribunal, the section uses the word "candidate" as defined in clause (b) of section 79 comprehensively covering those who were duly nominated as well as others who claimed to be duly nominated. Taken in the literal sense section 90 which provides for the issue of notices to the respondents means comprehensively that the candidate whether those who were duly nominated or others who claimed to be such, any who happened to be not on the record would have the right to appear after the notification of the election petition in the Gazette by the Tribunal and apply be made parties in the proceeding. The class who claimed to be duly nominated will only be those whose nomination was rejected by scrutiny under section 36, for as section 34 shows even the nominated candidate who did not deposit the security for costs, under section 117, will not be considered as duly nominated candidate. In the very nature of things the class of candidate who claimed to be nominated will be rare and unusual. The Legislature if they had meant to limit the scope of appearance under section 90 to the rare and unusual class of candidates should have said so distinctly and not setforth the provision in section 90 in the wide terms as it stands. There was no ground to limit the scope of section 90 by reference to section 82 and as remarked above under the comprehensive term of the section every candidate whether he was duly nominated or claimed to be such, would have the right to appear after the publication of the election petition in the Gazette, if he was not on record already.

This comprehensive meaning of the section finds support from the general scheme of the Act also and for this I refer to section 115 of the Act which gives right to the electors of the Constituency in general to appear and continue the proceeding on the death of the petitioner of the election petition. Section 116 in the like manner gives the right to the electors to come forward and to oppose the election petition if the respondent dies and no other respondent is left on the record to contest in the case. Similar right to appear and continue the proceeding has been given by section 110 to the electors if the application to withdraw the election petition is filed by the original petitioner. In order to ensure the right given, at all stages when the petitioner or respondent dies and application for withdrawal is filed, notification in the Gazette is provided to be made by the sections to give information to the electors. The proceeding on the election petition, as conceived in the Act, stands not simply in the interest of the individual contestants at the election but of the Constituency as a whole and the body of electors residing therein. If not literally the same in all details, in essential spirit the proceeding on an election petition, is one of a representative character similar to that provided in Civil Procedure Code by Order 1, Rule 8. Viewed in this light section 90 of the Act dealing with the independent right of the candidates to oppose or support the election petition stood by itself. It could not be controlled by section 82 to limit its scope and unaffected by negligence, mistake and ignorance on the part of the petioner in impleading parties, the

duly nominated candidates, if not already on the record, will have the independent right to appear in support or opposition of the election petition. His claim thereto could not be denied by any limited interpretation on section 90 and if such a duly nominated candidate not being already on the record appeared his application to be made respondent could not be refused. As a result the election petition which was defective for the absence from record of a duly nominated candidate, should have to be validated after the appearance of the duly nominated candidate. But if section 82 had truly the mandatory effect in the far-reaching sense as urged, the election petition which was required by it to have all the duly nominated candidates on the record from the outset could not be validated by any event arising at a subsequent stage such as that of appearance after the publication of the election petition in the Gazette by the Tribunal. Having given the independent right comprehensively to all the candidates as defined in section 79(b) to appear after the publication of the election petition in the Gazette, the Act, excluding the rare, unusual and indefinite class of candidate who claimed to be duly nominated by assailing the scrutiny, seems to have required all proper "duly nominated candidates" to be made parties at the early stage by section 82 as noted above in anticipation to obviate the delay that might be caused by their possible appearance at the late stage. In such circumstance the provision in section 82 could not be intended to be mandatory.

The same would appear to follow on the review of the general scheme and the essential spirit of the Act. The Legislature framing the proceeding as noted above in the nature and character of a representative proceeding under Order 1, Rule 8 C.P.C. in the interest not of individual candidate, but that of the Constituency as a whole and the body of electors could not have intended that the proceeding of the general importance should fail for a fault which, as will appear below in the present case proceeded from a bonafide and widely prevalent wrong notion. Accordingly this too along with section 90 as explained above militate against the argument that the election petition must fail for the failure to implead all the duly nominated candidates and section 82 to have the mandatory effect of the far-reaching character as urged.

The Civil Procedure Code providing by Order 1, Rule 9 that no suit must fail for non-joinder of parties makes a distinction between a proper party and necessary party. That is to say, the suit would fail when the party in whose absence effective decree could not be passed was omitted to be impleaded. But in the absence of what is termed "proper party" who was in some way interested but not such so as to make the egentual decree altogether ineffective, the Court inspite of his absence will proceed and pass the decree which will be justified in the circumstance. This principle of the Civil Procedure Code which has been applied by clause (2) of section 81 for all matters arising in the proceeding that were not specially provided for in the Act appears to have been in view when section 82 was framed. Having given independent right to the nominated candidates to appear after the notification of the election petition by the Tribunal, the Legislature seems to have required them to be made parties in the election petition at the early stage by section 82 simply by anticipation to obviate delay as remarked above. As shown above they could not have contemplated the far-reaching consequence of dismissal of the election petition for the non-compliance of a provision inserted by mere anticipation to obviate possible delay. Having required the nominated candidate to be brought on the record at the early stage the legislature very manifestly seems to have left to the Tribunal to deal with the matter of the joinder of parties on merits on the principles of Civil Procedure Code. Therefore if a necessary party like the returned candidate was left, the election petition could certainly not proceed in his absence. But except such essential parties and others who were in some manner personally involved by the allegation in the election petition, others must be regarded as mere proper parties. In the circumstances section 82 of the Act must be a mere directory provision and it could not have the imperative force so that election petition should fail *ipso facto* for mere non-compliance of section 82 in not joining all the duly nominated candidates from the outset.

The words "shall join" in section 82 upon which great stress has been laid also cannot be too strictly adhered to and Maxwell in his treatles on interpretation of statutes (9th Edition) citing authorities in the foot-note has remarked in Chapter 1, Section 3 at page 20 thus:—

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense and to adhere to its literal and primary meaning in all cases would be to miss its real meaning in many cases. Developing the same view the author has later at pages 22-23 remarked "the literal construction" (then) has but *prima facie* preference to arrive at the real meaning it is always necessary to get an exact constitution of the aim, scope and object of the whole Act."

W. F. Graise in his treatise on law of interpretation (second edition) has expressed similar view and after review of case laws he has remarked at page 117 thus:—

> "..... meaning of ordinary words when used in Acts of Parliament is to be found, not so much in strict etymological property of language nor even in popular use, as in the subject or occasion on which they are used and the object which is intended to be attained."

Next referring to affirmative direction like that one finds in section 82, Craise in his treatise quotting the observation of Lord Campbel in the case, Liverpool *Versus* Turner (1861) 30 C.L.J. Ch. 379 has remarked:—

> "No universal Rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory that implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature carefully attending to the whole scope of the statute to be construed. Lord Penzance in Howard *Versus* Bodington developing the same view has been quoted to have added,".. ...as far as any Rule is concerned you cannot go further than that in each case, you must look to the subject matter, consider the importance of the provision (in question) and the relations of that provision to the general object intended to be secured by the Act and upon a review of the case in that aspect decide whether the enactment is what is called imperative or directory."

Maxwell too in his treatise at pages 372 and 373 referring to the affirmative direction has expressed the same view as above and has noted:—

> "The reports are full of cases dealing with statutory provision which are devoid of indication of intention regarding the effect of non-compliance with them. In some of them the condition, forms and other attendant circumstances prescribed by the statute have been regarded essential to that Act or the thing regulated by it and their omission has been held vital to its validity. In others, such prescriptions have been considered as merely directory the neglect of which did not affect its validity or involve any other consequence than a liability to penalty if any were imposed for breach of the enactment. The propriety indeed of very ever treating the provision of any statute in the latter manner has been sometimes questioned, but it is justifiable in principles as well as abundantly established by numerous authorities."

The principle of interpretation, as given above, has been accepted and laid down in 11 C.W.N. 1011 and 1943 Calcutta 266 and other decisions by our High Court too. So the word "shall join" in section 82 also will not help the respondents greatly.

Section 80 which was another section of the Act relied upon broadly should have meaning only to the effect that an election could not be challenged unless an election petition was filed. It will be a wrong logic to give mandatory force indiscriminately to all the provisions in the Act some of which as has been shown above in regard to the very section 82 itself, may have been essentially only directory in character. The meaning and force of the provision will have to be found in an independent way by taking account of the whole structure of the Act as shown by quotations of the authorities. Therefore section 80 of the Act also cannot be of any avail to the respondents.

From the copy of the judgment filed in one of the election cases of Mr. Shah Umair Saheb the Tribunal at Lucknow seems to have considered section 82 to be imperative in effect and the election petition to be liable to be dismissed for non-joinder of any of the duly nominated candidates. In Duabia's election cases also there are reports of cases which were dismissed on the same ground.

But the cases noted by Duabia were those that came under the old Rules in force before the enactment of the present Act of 1951 by which the body of duly nominated candidates were required to be implied only when the petitioner claimed the declaration for the validity of his own election and in the cases referred, to from Duabia's book the relief essentially personal in nature only was disallowed. Otherwise the other relief by which the whole election was sought to be declared void on the ground of corrupt and illegal practices was allowed to be proceeded with. As against this the present law requires the body of duly nominated candidates to be impleaded in all circumstances irrespective of the relief sought and is not confined to the relief of a personal nature as was the case with the old Rules. The present law has different object and purpose as

discussed above and being so the decision in the cases under the old Rules given in Duabia's election cases cannot be applied under the present law. I may in this connection cite also the election case of Mr. T. Prakasam of Madras the judgment of which has been published in Madras Gazette (Extra-ordinary) dated 10-1-1953 in which the Tribunal distinguished the decision under the old Rules in the same manner as above.

The Lucknow cases noted above had however been decided under the present law. But there was no unanimity of decision in this behalf at other places and the Tribunal at Rewan (copy of the judgment filed here) in the election case of petitioner Keshab Prasad seems to have allowed the election petition to proceed in spite of certain of the duly nominated candidates who had withdrawn not being impleaded as respondents. This latter judgment has cited a case tried by the Tribunal at Allahabad in which in the similar manner the election petition was allowed to proceed in spite of certain of the duly nominated candidates who have withdrawn not being impleaded. These latter cases of Rewan and Allahabad, however seem to have based their decisions on the interpretation that a candidate who had withdrawn his candidature, did not come within the terms "duly nominated candidates" in section 82. But I will refer to the judgment of Mr. Sribastav, one of the Members of the Tribunal in the case of Rewan who had not agreed to the above interpretation, the case having terminated by the judgment of the majority. Though Mr. Sribastav did not finally decide the point for its not arising in view of the majority opinion still he has made remarks expressing as being in favour of taking the provision in section 82 as simply directory and not such for which a non-compliance implied dismissal of the election petition. The same view was expressed in the election case of Mr. T. Prakasam, already referred to above and the Tribunal in this case too remarking against the extreme mandatory character of section 82, allowed the duly nominated candidates who had been omitted to be added as respondents. There was thus no settled unanimity of view on the vital question and with respect to the Lucknow case from the absence of discussion in the judgment it appears that the general scheme of the Act and other matters like the effect of section 90 which were important were not placed before the Tribunal. With all respects I do not agree with the view taken by the Tribunal at Lucknow.

In view of the underlying basic scheme of the Act and the object and purpose of the provision of section 82 and other matters discussed above I find "duly nominated candidaets" who were required by section 82 to be impleaded as such to be mere proper parties. As already remarked unless the Tribunal finds from the nature and character of the allegations to be not justly possible to pass an order such as would be the case if the returned candidates were omitted, it cannot for the mere failure to implead duly nominated candidates dismiss the election petition.

The next question that now arises in whether the duly nominated candidates who had been omitted to be made respondents in the present case were such that justly no decision can be given in their absence. As to this it is very important that they had withdrawn their candidatures. They did not care to come forward even after the notification of the election in the Gazette by the Tribunal though they had a right to that under section 90 of the Act. There is also nothing either in the election petition or even in the written statement of the respondents affecting them particularly. There cannot therefore be any injustice involved if the case proceeding in their absence.

I will note here another important fact. The election petition has first to be presented before the Election Commission and as section 85 of the Act shows the power to dismiss an election petition for any technical fault was reserved primarily in the hands of the Election Commission. In true sense the Tribunals according to the scheme of the Act were appointed mainly for the trial of the election petition on merits. Under the old law and the Rules made thereunder the Tribunal was not at all given the power to dismiss an election petition for a technical fault. Under the present Act the Tribunal has no doubt been given by clause (4) of section 90 wider powers of dismissal but then a wide discretion has been given in that behalf as the use of the word "may" in clause (4) of section 90 indicates. In this connection it further appears from the judgment in Rewan case referred to above that out of 11 cases standing for trial there, in 8 cases the petitioners did not implead the nominated candidates who had withdrawn. Such kind of failure had occurred at Allahabad and Lucknow also as the judgment referred to above shows. Here at this place out of 6 cases in 3 cases the candidates who had withdrawn had not been impleaded. It seems impression had widely gone round that candidates who had withdrawn were not necessary to be impleaded and this was probably due to section 38 of the Act which required

the list of candidates who remained to go to the polls after withdrawals to be published in the Official Gazette separately. A wrong impression however created will no doubt be no excuse in any circumstance against law, nevertheless it has to be noted that the petitioner here for not impleading the nominated candidates who had withdrawn, was evidently the victim of a widely prevalent wrong impression. The omission was *bona fide* and to a large extent due to the very confusing provision which required the list of candidates who remained to go to the polls to be published separately in the Official Gazette. As such when the Tribunal had wide discretion as already remarked in justice it was a fit matter to be considered if the petitioner should go with his grievances uninvestigated for the mere *bona fide* technical error. The interest of the public which was directly involved also required to be taken into consideration and all these in my view should incline the Tribunal in justice not to treat the omission too seriously and dismiss the election petition summarily for the accidental omission to implead certain of the duly nominated candidates.

The petitioner filed an application on 28th November 1952 paying to add the two candidates Shree Harihar Garain and Shree Rajeshwari Prasad who had not been impleaded. This application was opposed. But by clause (2) of section 90. the Civil Procedure Code had been applied generally for all matters arising before the Tribunal that had not been provided for. I may in this connection refer also to the above election case of Mr. T. Prakasam of Madras. This case has discussed fully the question about the application of the Civil Procedure Code in the proceeding regarding the election case and has as said above considered the provisions of the Civil Procedure Code to be applicable for all matters which as stated above had not been specially provided for. So under Order 1 Rule 10 C.P.C. new parties can be added at any stage at the trial. The question of limitation also will not stand in the way when the duly nominated candidates who were omitted were mere proper parties and when the proceeding of the case as noted above could continue even in their absence. But in the circumstances of the case when the petitioner has filed the application to make them the parties, it would be appropriate to add them as respondents.

Hence the decision of my learned brothers. the Chairman and Mr. Ghose the other Member of the Tribunal took a different view. They found section 82 which required the duly nominated candidates to be made respondents as mandatory in effect and the election petition for not impleading the two candidates Shree Harihar Garain and Shree Rajeshwari Prasad to be vitally defective and liable to be dismissed on that ground. They also found the application to add the two nominated candidates to be not sustainable and the Tribunal to have no powers and adequate ground to add them as respondents at this stage.

With all respects to my learned brothers I take different view on both the matters and as discussed above, I find that section 82 was only directory in character and failure to implead Shree Harihar Garain and Shree Rajeshwari Prasad did not in the circumstances of the case justify the dismissal of the election petition.

The election petition could even proceed in the absence of the said two candidates who were not interested in the case in any manner as remarked above. But since the petitioner has moved the Tribunal to add them as respondents this too must appropriately be allowed. I record my finding in the case accordingly on the preliminary points raised at this stage.

The 29th January 1953. (Sd.) GOVIND SARAN, *Member.*

ORDER OF THE TRIBUNAL

The position, therefore, is that two of us, Mr. S. B. Sengupta and Mr. N. K. Ghose, are of the view that the entire election petition must be dismissed for non-joinder of the candidates in question, that these candidates cannot be added as respondents and that the petition for amendment filed by the petitioner to that effect must be dismissed. But the third Member Mr. Gobind Saran disagrees and his view is that the election petition is maintainable and can proceed in the absence of the candidates in question and also that it will be more appropriate to add them as respondents as the petitioner has made a prayer to that effect.

Under section 104 of the Act if there is a difference of opinion amongst the Members of the Tribunal the opinion of the majority shall prevail and the orders of the Tribunal shall be expressed in terms of the views of the majority.

The order of the Tribunal therefore is that the entire election petition be dismissed with costs of Rs. 150 including pleader's fee, payable by the petitioner to the contesting respondent No. 1.

(Sd.) S. B. SENGUPTA, *Chairman.*
(Sd.) N. K. GHOSE, *Member.*
(Sd.) GOVIND SARAN, *Member.*

[No. 19/215/52-Elec.III.]

The 29th January 1953.

S.R.O. 286.—WHEREAS the election of Shri Rameshwar Prasad Mahtha, as a member of the Legislative Assembly of the State of Bihar from the Barhi constituency of that Assembly has been called in question by an election petition (Election Petition No. 310 of 1952 before the Election Commission) duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Muni Ram Gupta S/o Shri Jagoo Sao, Mohalla Barabazar, P.O., P.S., and District Hazaribagh;

AND WHEREAS the Election Tribunal appointed by the Election Commission in pursuance of the provisions of section 86 of the said Act for the trial of the said petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order on the said Election Petition;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

IN THE COURT OF THE ELECTION TRIBUNAL, HAZARIBAGH

PRESENT:

Mr. S. B. Sengupta—*Chairman.*

Mr. Govind Saran—*Member.*

Mr. Nirmal Krishna Ghose—*Member.*

(In the matter of election case to the Bihar Legislative Assembly, 1952. from Barhi Constituency, District Hazaribagh, State of Bihar.)

Muni Ram Gupta—*Petitioner.*

Versus

1. Rameshwar Prasad Mahtha,
2. Bishwanath Modi,
3. Dr. Satya Narain—*Respondents.*

JUDGMENT OF MR S. B. SENGUPTA, CHAIRMAN AND MR. N. K. GHOSE, MEMBER.

This is an election petition filed by Shree Muni Ram Gupta for declaration of the election of Shree Ramesh Prasad Mahtha (respondent No. 1) to the Bihar Legislative Assembly from Barhi Constituency as void. The petition is opposed by Shree Rameshwar Prasad Mahtha (respondent No. 1) on various grounds. One of the grounds is that Shree Badri Narain Singh and Shree Laldhari Modi, whose nominations were accepted by the Returning Officer under section 36 and who withdrew their candidatures thereafter under section 37 of the Representation of the People Act, 1951, have not been made respondents in the election petition, which is therefore not maintainable and shall be dismissed for their non-joinder as respondents. In this connection a preliminary issue has been framed, as follows:—

Issue No. 3.—Is the election petition liable to be dismissed on account of the non-joinder of duly nominated candidates as necessary parties?

The petitioner has also filed a petition for amendment of the election petition by adding the aforesaid candidates as respondents. We are therefore, also to consider if this amendment petition shall be allowed. It is important to note that if these points be decided against the petitioner it will not be necessary to enter into and decide other issues framed in the case.

It is undisputed that the aforesaid candidates nominations were accepted by the Returning Officer after scrutiny under section 36 and the candidates thereafter

withdrew their candidatures under section 37 of the Act and their names were not published in the list of *"valid nominations"* under section 38 of the Act.

The points which arise in this connection are covered by section 82 of the Act. Section 82 runs as follows:—

> "A petitioner *shall* join as respondents to his petition all the candidates who were *duly nominated* at the election—other than himself if he was so nominated."

In the application of section 82, stress is to be laid on the words *shall, all* and *duly nominated,* used in this section.

Three points arise for determination in this connection.

Point No. 1.—The first point is—whether a candidate whose nomination has been accepted under section 36, but who withdraws his candidature thereafter under section 37 and whose name does not therefore appear in the list of *valid nominations* published under section 38 comes within the term *"duly nominated"* used in section 82.

It is contended on behalf of the petitioner that the term *"duly nominated"* includes only those candidates whose names have been published in the list of *valid nominations* under section 38 and does not include those candidates whose nominations have been accepted under section 36, but who have withdrawn their candidatures under section 37.

We do not agree to this contention. In the Act a distinction has been made between the term *"duly nominated"* and the term "valid nomination" (or *"validly nominated"*) used in section 38. The term *"duly nominated"* is a wider term than the term *"validly nominated"*. The term *"duly nominated"* means all candidates whose nominations have been accepted by the Returning Officer after scrutiny, under section 36; it therefore includes

(1) all nominated candidates who withdraw their candidatures under section 37 and

(2) all nominated candidates who do not withdraw their candidatures under section 37 and whose names are published in the list of *valid nominations* under section 38. The distinction between the two terms will be clear, if one carefully goes through the relevant sections relating to nomination, *i.e.*, sections 33, 34, 36, 37 and 38. Sections 33, 34, and 36 relate to nomination up to the stage when the nomination is accepted after scrutiny, under section 36, and not thereafter. The term *"duly nominated"* has been used thrice in section 33 thus:—

1. In sub-section (3): ".....no candidate shall be deemed to be *duly nominated* unless such declaration is, or all such declarations are, delivered along with the nomination paper."

2. In the second proviso of this sub-section: ".....no candidate shall be deemed to be *duly nominated* for the seat so reserved unless the nomination paper is accompanied by a declaration....."

3. In the third proviso of this sub-section: ".....such person shall not be deemed to be *duly nominated* as a candidate unless his nomination paper is accompanied by a certificate....."

This term has also been used in section 34, which runs thus:—

> *"Deposits.*—(1) A candidate shall not be deemed to be *duly nominated* unless he deposits....."

The term has again been used in section 36, sub-section (3), thus:—

> ".....if the candidate has been *duly nominated* by means of another nomination paper in respect of which no irregularity has been committed."

The use of the term *"duly nominated"* in sections 33, 34 and 36 (quoted above) clearly goes to prove that the term includes all those candidates whose nominations have been accepted after scrutiny under section 36, irrespective of the question whether such nominated candidates withdraw their candidatures thereafter, under section 37.

The distinction between the two terms, *"duly nominated"* and *"validly nominated"*, and their meanings have been clearly brought out and emphasised in the

definition of the term *"validly nominated candidate"* in Rule 2 relating to INTERPRETATIONS in the Representation of the People (Conduct of Elections and Elections Petitions) Rules, 1951. Rule 2, clause (f) runs thus:—

> "validly nominated candidate" means a candidate who has been *duly nominated and has not withdrawn his candidature* in the manner and within the time specified in sub-section (1) of section 37 or in that sub-section read with sub-section (4) of section 39, as the case may be.

Section 38 also brings out the distinction between the two terms very clearly. Section 38 runs thus:—

> *"Publication of nominations.*—The Returning Officer shall, immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (1) of section 37, prepare and publish a list of *valid nominations*, in such manner as may be prescribed."

Section 38 relates to nomination after the acceptance of the nomination paper under section 36 and after withdrawal of the candidature under section 37. But in section 38, the term "duly nominated" has not been used; the term used is *"valid nomination"*.

There cannot be any manner of doubt therefore that a *validly nominated* candidate, as distinguished from a *duly nomniated* candidate, means only those duly nominated candidates who have not withdrawn their candidatures and whose names have been published in the list of valid nominations under section 38. But a *duly nominated* candidate means all those candidates whose nominations have been accepted after scrutiny under section 36 and therefore includes (1) those duly nominated candidates who withdraw their candidatures thereafter under section 37 and (2) also those duly nominated candidates who do not withdraw their candidatures thereafter under section 37.

It is significant to note that in section 82, the words used are *"all* the candidates who were *duly nominated* at the election" and the words *"and* have not withdrawn their candidature" have been deliberately omitted from section 82. The term "validly nominated" has also not been used in section 82.

In connection with one election petition on this point, it has been argued before us that the words, *"and has not withdrawn his* candidature" used in the definition of a validly nominated candidate in Rule 2(f) of the Representation of the People Rules, 1951 (quoted above), are redundant and form a tautologous expression and that *'validly nominated' and 'duly nominated'* are interchangeable terms and have the same meaning and include only those candidates who have not withdrawn their candidatures under section 37 and whose names have been published in the list of *valid nominations* under section 38; *i.e.* only those candidates who actually "go to the polls". In support of this argument our attention is drawn to sections 52 and 53 of the Act. This argument is clearly wrong. As stated above, the Act has made a clear distinction between the two terms *duly nominated* and *validly nominated*. The use of the words *"and has not withdrawn his candidature"* in the definition of a *validly nominated* candidate in Rule 2 (f) has been made with deliberate case; the words are not redundant. This will also be clear from sections 52 and 53 to which our attention has been drawn. Section 52 relates to "Death of candidate before poll" *i.e.* the section comes into operation "if a candidate who has been *duly nominated* under this Act dies *after* the date fixed for the scrutiny of nominations". Such deaths may occur either

(1) before the expiry of the period within which candidatures may be withdrawn under section 37, or

(2) after the expiry of such period.

If death occurs before the expiry of the period within which candidatures may be withdrawn, the candidate may die, though after the acceptance of his nomination after scrutiny under section 36, but before he could exercise his option to withdraw or not to withdraw under section 37. Such a candidate cannot be described as one who has been duly nominated and *has not withdrawn his candidature;* he shall be described as a candidate who has been duly nominated and the words "has not withdrawn his candidature" cannot be added to it. The death of such a candidate would come under the purview of section 52. The death of a candidate contemplated in section 52 does not therefore necessarily mean the death of a candidate who had opportunity to exercise his option to withdraw under section 37 before his death and who has not withdrawn his candidature. So the expression "and has not withdrawn his candidature" has been deliberately omitted from section 52. But section 53 relates to "Procedure in contested and uncontested elections". Necessarily therefore it relates to only those candidates who have been

duly nominated and *who have not withdrawn their candidatures, i.e.* to those who actually "go to the polls". Consequently the expression "who have not withdrawn their candidatures" under section 37 has been deliberately used in section 53. The two sections 52 and 53 therefore clearly bring out the distinction between the two terms, *duly noimnated* and *validly nominated,* as discussed above.

Our attention has also been drawn to the earlier Rules framed under the Government of India Act, 1935, in this connection. But in the earlier Rules there does not appear to have been any distinction made between the two terms, *duly nominated* and *validly nominated.* But the distinctions between the two terms being clear in the present Act and the term used in Section 82 being *duly nominated* and not *validly nominated,* there cannot be any doubt that the term *duly nominated* used in section 82 means all candidates whose nominations were accepted after scrutiny under section 36, irrespective of the question whether such duly nominated candidates withdrew their candidatures thereafter under section 37.

We have therefore no doubt that the term *"all the candidates who were duly nominated"* used in section 82 means all the candidates whose nominations were accepted after scrutiny under section 36 and it includes those candidates also, who, after the acceptance of their nominations under section 36, withdrew their candidatures under section 37. This term also includes those candidates who, after the acceptance of their nominations after scrutiny under section 36, have not withdrawn their candidatures under section 37. It is this latter class of duly nominated candidates only, who are called *validly nominated* candidates and whose names are published in the list of *valid nominations* under section 38. According to the contention of the petitioner, the term *"duly nominated"* used in section 82 means only this latter class of nominated candidates whose list is published in the list of *valid nominations* under section 38. That is, according to his contention, the term *"duly nominated"* used in section 82 means "validly nominated". If his contention were correct, either the term *validly nominated* instead of the term *"duly nominated"* would have been used in section 82 or the words *"and have not withdrawn their candidatures"* would have been added after the words "duly nominated" in section 82 [as has been done in the definition of a *"validly nominated candidate"* in Rule 2 (f) of the Representation of the People Rules, 1951, quoted above]. The fact that this was not done conclusively shows that the contention of the petitioner is not correct.

Clearly therefore, a candidate whose nomination paper has been accepted after scrutiny under section 36, but who has thereafter withdrawn his candidature under section 37, comes within the term *"duly nominated"* and falls within the purview of section 82; and under section 82 such a duly nominated candidate shall be joined as a respondent in the election petition, by the petitioner Consequently the aforesaid candidates who were duly nominated and who withdrew their candidatures thereafter under section 37, are *necessary* parties to the election petition under section 82.

Point No. 2.—The second point which then arises is whether in the absence of the aforesaid candidates being made respondents to the election petition, the election petition is maintainable or is liable to be dismissed.

From the wordings of section 82 it is clear that the section is mandatory. Here we lay special emphasis on the word *"shall"* used in this connection. The Representation of the People Act, by its very nature, should be strictly construed. It will be noted that throughout this Act the two words *"shall"* and *"may"* have been used with great care, keeping the distinction between the meanings of the two words clearly in view. Wherever the word "shall" has been used, it means that the provision in which the word occurs is imperative and of a mandatory nature. Whenever the Parliament have thought fit to qualify the mandatory nature of a provision conveyed by the word *"shall"*, it has been done by adding a proviso or a sub-section, or a separate section. As for example, the provisions of sub-section (1) and (2) of section 83 are mandatory, the word *"shall"* having been used in both the sub-sections. But the mandatory nature of these two sub-sections have been qualified in their application, so far as the Election Tribunal is concerned, by the addition of sub-section (3) by which it has been provided that the Tribunal *"may"* allow the particulars included in the list [mentioned in sub-section (2)] to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished. But there is no such proviso or sub-section or separate section to qualify the mandatory nature of section 82. Section 82 being thus mandatory, it is *incumbent* upon the petitioner to join as respondents to his petition all the candidates who were duly nominated at the election. The petitioner has no option nor discretion in the matter. From the mandatory nature of section 82 it necessarily follows that non-compliance with its provision is fatal. The provision for dismissal for non-compliance of a section of a mandatory nature is inherent in the section itself. Any separate provision for dismissal for non-compliance of a mandatory section is unnecessary and would be superfluous.

In this connection it is pointed out on behalf of the petitioner that there are provisions in the Act for dismissal of an election petition. These provisons are to be found in section 85, which applies to the Election Commission, and in section 90 sub-section (4), which applies to the Election Tribunal. Under section 85 the Election Commission *shall* dismiss an election petition if the provisions of sections 81, 83 or 117 are not complied with. Section 90 sub-section (4) lays down:—

> "Notwithstanding anything contained in section 85 the Tribunal "*may*" dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

It is further pointed out on behalf of the petitioner that in section 85 or in section 90 sub-section (4) there is no provision for dismissal of an election petition for non-compliance with the provision of section 82 and there are no other provisions in the Act for the dismissal of the election petition on that ground. It is therefore contended that section 82 has been deliberately omitted from section 85 and section 90 sub-section (4) and it follows therefrom that non-compliance with section 82, *i.e.*, the failure on the part of the petitioner to make a duly nominated candidate a respondent in the election petition, is not fatal to the maintainability of the petition which can proceed in the absense of such a candidate being made a party.

We do not agree to this contention. We agree that the omission of section 82 in section 85 and in section 90 sub-section (4) is *deliberate*. The omission is not only deliberate, but it is *significant*. It is true that sections 83 and 117 are mandatory, the word "*shall*" having been used in these sections; the provision in section 81 on the point of limitation is also mandatory. But the Parliament have thought fit to qualify the mandatory nature of these sections so far as the Election Tribunal is concerned, but not so far as the Election Commission is concerned. Hence the necessity for enacting section 85 and section 90 sub-section (4). By section 90 sub-section (4) a discretion has been given to the Election Tribunal to dismiss an election petition for non-compliance with section 81, section 83 or section 117 and the word "*may*" has been used in it. But this discretion having been denied to the Election Commission, enactment of section 85 was necessary. In section 85 also the mandatory nature of section 81, so far as the question of limitation is concerned, has been qualified by giving a discretion to the Election Commission by adding a proviso that the Election Commission "may" in its discretion condone the delay in presenting an election petition after the expiry of the period of limitation, on sufficient cause being shown. Thus section 85 and section 90 sub-section (4) further illustrate our point of view that the word "shall" has always been used in the Act to imply the mandatory nature of the provision in which it occurs. But the deliberate omission of section 82 from section 85 and section 90 sub-section (4) clearly goes to show that the provision of this section 82 remains absolute and unqualified in its application by both the Election Commission and the Election Tribunal. The necessary conclusion therefore is that for non-compliance of the provision of section 82, *i.e.*, for the failure of the petitioner to join the aforesaid candidates as respondents, the Election Commission and the Election Tribunal are not only empowered, but are *bound* to dismiss the election petition.

It will be further noted that under section 80,

> "No election *shall* be called in question except by an election petition presented in accordance with the provisions of this Part."

The plain meaning of this carefully worded section 80 is that if the election petition is not presented in accordance with the provisions of Part VI, the election petition shall be dismissed. This section 80 is also mandatory and applies equally to the Election Commission and to the Election Tribunal. It not only empowers, but it makes it *obligatory* on both the Election Commission and the Election Tribunal to dismiss the election petition. Reading the two sections 80 and 82 together we find that the Election Commission and the Election Tribunal are bound to dismiss an election petition if it fails to comply with the provision of section 82. Neither the Election Commission nor the Election Tribunal has any discretion to proceed with the election petition, if it does not comply with the provision of section 82.

There is a further provision for the dismissal of an election petition by the Election Tribunal which is to be found in section 98 of the Act. Section 98 runs thus:—

> "At the conclusion of the trial of an election petition the Tribunal shall make an order:—
>
> (a) dismissing the election petition; or

(b) declaring the election of the returned candidate to be void; or

(c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or

(d) declaring the election to be wholly void."

It has been argued on behalf of the petitioner that the word "conclusion" used in section 98 means *that* stage of the trial which comes after the recording of the evidence and that therefore under this section 98 an Election Tribunal cannot dismiss an election petition only on the ground of non-compliance with the provision of section 82 before entering into evidence on the merits of the election petition. We are unable to accept this interpretation of the word "conclusion". The term *"conclusion of the trial"* used in section 98 means the stage when the election petition can be finally disposed of and the trial can therefore be concluded. That which concludes the trial is "the conclusion of the trial". We therefore hold that when we find that for the failure to comply with the provision of section 82 the election petition is not maintainable and for this fatal defect the election cannot be called in question under section 80, the Election Tribunal can dismiss the election petition under section 98 also, as the fatal defect occurring in the election petition concludes the trial.

There cannot be any difference of opinion on the point that the term "all the candidates who have been duly nominated" used in section 82 includes the *returned* candidate. Now let us take an extreme example. Suppose, the returned candidate has not been made a respondent in the election petition. Because there is no specific provision for dismissal of an election petition for non-compliance of section 82, as contended on behalf of the petitioner, would it follow that in the absence of the returned candidate whose election is sought to be set aside the election petition would be maintainable and could proceed? This is simply absurd. Failure to make the returned candidate a respondent in the election petition is fatal, and both the Election Commission and the Election Tribunal are bound to dismiss an election petition for such failure.

In this connection it has been argued that a returned candidate stands on a different footing from the other "duly nominated" candidates It is contended that the candidates in question having withdrawn their candidatures under section 37, they ceased to have any interest in the election which took place thereafter and they expressed their unconcern to the election by the withdrawal of their candidatures; these candidates are therefore not affected at all by the trial of the election petition in their absence; and therefore in the absence of those duly nominated candidates who have withdrawn their candidatures, the election petition is maintainable and can proceed. If this contention of the petitioner were correct, then the term *"validly nominated candidates"* or the term *"duly nominated candidates who have not withdrawn their candidatures"* would have been used in section 82 instead of the term *"duly nominated"*. We have already discussed this point.

It has also been argued before us in connection with some of the election petitions that where the petitioner does not claim a declaration that he himself has been duly elected, but simply calls in question the election of the returned candidate, the candidates in question who have withdrawn their candidatures and the defeated candidates also are not *necessary* parties and the election petition is maintainable and can proceed in their absence. If this contention of the petitioner were correct, then the Parliament must have made separate provisions regarding joinder of respondents for different kinds of election petitions praying for different kinds of reliefs. But this has not been done, as is evident from the wordings of section 82, which uniformly applies to all kinds of election petitions praying for all kinds of reliefs.

In this connection it is necessary to refer to the earlier Rule framed under the Government of India Act 1935. The Rule framed under the Government of India Act 1935, corresponding to the present section 82 of the Representation of the People Act, 1951, ran thus:—

> "If a petitioner in addition to calling in question the election of a returned candidate claims a declaration that he himself has been duly elected, he shall join as respondents to his petition all other candidates who were nominated at the election."

It will be noted that in the earlier Rule, in cases where the petitioner merely called in question the election of the returned candidate, it was *not incumbent* upon him to join as respondents all the candidates who were nominated at the election. But in cases where the petitioner claimed a declaration that he himself

had been duly elected, the earlier Rule and the present section 82 are exactly the same. But in the present section 82 this distinction between the two different kinds of cases has been done away with; and under the new section 82 it is *incumbent* upon the petitioner *in all cases* to join as respondents *all* the candidates, who were duly nominated at the election. This deliberate change made in section 82 on the point of joinder of respondents, by providing that in both kinds of cases the petitioner shall join as respondents *all* the candidates who were duly nominated, clearly goes to show that the intention of the Parliament in framing section 82, as it is, is to make it *obligatory* upon the petitioner to make *all* the candidates, who were duly nominated, as respondents in the election petition, whatever might be the prayer of the petitioner.

We therefore find that under section 82 all the candidates who were *"duly nominated"* have been placed on the same footing; the same principle applies to a returned candidate, a defeated candidate and any other duly nominated candidate, whatever may be the relief claimed in the election petition. In section 82, no distinction has been made amongst different classes of *"duly nominated"* candidates on the point of joinder of respondents. In view of the clear provision of section 82, the Tribunal is debarred from making any such distinction amongst the different classes of duly nominated candidates on this point. As clearly the absence of the returned candidate makes an election petition inadmissible and liable to dismissal, so the absence of any other duly nominated candidate from the election petition would make it equally inadmissible and liable to dismissal. The candidates in question being found to come within the term *"duly nominated"* and therefore within the purview of section 82, the failure on the part of the petitioner to make the aforesaid candidates as respondents in the petition is fatal to its maintainability and the election petition must therefore be dismissed. The election petition cannot proceed or be enquired into, in the absence of the candidates in question.

Point No. 3.—The third and last point which arises is whether the aforesaid candidates can be added as respondents and whether the amendment petition filed by the petitioner to that effect can be allowed.

In this connection it is pointed out on behalf of the petitioner that under section 90 any other candidate, who has not been joined as a respondent in the election petition, is entitled to be joined as such. It is therefore contended on behalf of the petitioner that the aforesaid candidates can now be joined as respondents and the amendment petition filed by the petitioner to that effect should be allowed.

We do not agree to this contention also. The petitioner cannot certainly invoke the aid of section 90 in his behalf. Under section 90, any other candidate can, of his *own motion*, join as a respondent, on certain terms and under certain conditions only. Such a candidate must apply within fourteen days from the publication of the election petition in the official Gazette and he must also give such security for costs as the Tribunal may direct. Section 90 is obviously meant for the benefit of other candidates and not for the benefit of the petitioner. So section 90 is of no avail to the petitioner.

It has also been argued that under section 90 sub-section (2) the provisions of Civil Procedure Code as to joinder of parties shall be applicable here. Section 90 sub-section (2) runs thus:—

> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act V of 1908), to the trial of suits."

This sub-section itself lays down that the provisions of the Civil Procedure Code are subject to the provisions of the Representation of the People Act, 1951, and the Electoral Rules made thereunder. It is therefore necessary to examine carefully the provisions for joinder of defendants in the Civil Procedure Code and compare them with the provision of section 82 of the Act. The provisions of the Civil Procedure Code on this point are to be found in Order 1, Rules 3, 6, 9 and 10. Order 1 Rule 3 runs thus:—

> "All persons *may* be joinder as defendants against whom any right to relief .....is alleged to exist....."

Order 1 Rule 6 runs thus:—

> "The plaintiff *may*, at his option join as parties to the same suit all or any of the persons severally, or jointly and severally, liable to any contract..."

From the wordings of these two Rules and specially from the use of the word *may* in them, it is clear that these Rules are not imperative and are merely directory; and a plaintiff is *not bound* to join all persons as defendants, whom he *may* do so if he chooses. The non-imperative nature of these Rules has been clearly brought out in Order 1 Rule 9, which runs thus:—

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court *may* in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.".

These three Rules are therefore clearly in conflict with the provision of section 82 of the Act we are dealing with, which lays down that it is *obligatory* upon the petitioner to join as respondents *all* the candidates who were duly nominated at the election. This conflict, by the way, further emphasises the mandatory nature of section 82. The clear provision of section 82 therefore shows that the Rules regarding joinder of defendants of the Civil Procedure Code cannot be applied to election petitions.

We should further note that if all the provisions of the Civil Procedure Code regarding amendment of pleadings were applicable to an election petition it was not necessary for the Parliament to enact sub-section (3) of section 83, which sub-section provides that the Tribunal may allow the particulars included in the "list" to be amended or order such further and better particulars in regard to any matter referred to therein, to be furnished. The enactment of the specific rule regarding amendment made in sub-section (3) of section 83 also goes to show clearly that the Rules regarding amendment of pleadings made in the Civil Procedure Code are not applicable to election petitions.

We therefore hold that under the Representation of the People Act, the Tribunal has no power to add new candidates, who were duly nominated at the election but have not been joined as respondents in the original election petition.

In connection with one election petition on this point it has been argued before us that when the Tribunal finds that, in the absence of the aforesaid candidates being made respondents in the election petition, the election petition cannot be gone into, the Tribunal shall invoke the aid of Order 1 Rule 10 of the Civil Procedure Code and, of *its own motion*, add those candidates as respondents. For the reasons stated above this Rule regarding addition of parties contained in Order 1 Rule 10 of the Civil Procedure Code cannot be applied to an election petition. The discretion given to a plaintiff regarding joinder of defendants under Order 1 Rules 3 and 6 of the Civil Procedure Code makes it necessary for the framing of Order 1 Rule 10 of the Code. But section 82, by laying down that it is *incumbent* upon the petitioner to join as respondents *all* the duly nominated candidates in all cases, precludes the possibility of any scope for addition of respondents and for application of Order 1 Rule 10 of the Civil Procedure Code by the Tribunal either at the instance of the petitioner or of its own motion. We should add in this connection that under section 92 of the Act:—

> "The Tribunal shall have the *powers* which are *vested* in a Court under the Code of Civil Procedure 1908 (Act V of 1908), when trying a suit in respect of the following matters.—
>
> (a) discovery and inspection;
>
> (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
>
> (c) compelling the production of documents;
>
> (d) examining witnesses on oath;
>
> (e) granting adjournments;
>
> (f) reception of evidence taken on affidavit; and
>
> (g) issuing commissions for the examination of witnesses, and may summon and examine *suo motu* any person whose evidence appears to it to be material....."

If all the provisions of the Civil Procedure Code were applicable to the trial of an election petition under section 90 sub-section (2), section 92 would be altogether superfluous. The framing of section 92 clearly shows that, apart from mere *rules or procedure* the Civil Procedure Code *vests* a Court with certain *powers* in conducting the trial of a case and such powers given under the Code of Civil Procedure are not to be applied in the trial of election petitions except where special provision to that effect has been made in the Act. It is only with regard to matters enumerated in section 92 of the Act that the Tribunal has been vested with powers

given under the Civil Procedure Code. It will be noted that in clause (g) of section 92 it has been provided that the Tribunal may summon and examine any person *suo motu*. If the provision of Order 1 Rule 10 Civil Procedure Code empowering a Court to add parties to a suit *suo motu* were applicable to an Election Tribunal, there must have been a specific provision for it in the Act or it must have been included in section 92 of the Act. The fact that this was not done is an additional ground to show that the Tribunal has not been given any power to add any candidate as a respondent, either of its own motion or at the instance of the petitioner.

Question of limitation will also arise in connection with the petitioner's application for amendment of the election petition by adding new candidates as respondents. Would the petitioner be allowed to add new candidates as respondents at any stage? Under section 90 any other candidate has the right to apply for being a respondent within fourteen days from the publication of the election petition in the Official Gazette. There are certain time limits fixed for the presentation of election petitions before the Election Commission, under Rule 119 of the Representation of the People Rules, 1951. Those periods of limitation passed long ago. Under section 85 of the Act Election Commission has been given power to extend the period of limitation for presentation of an election petition on sufficient cause being shown. No such power has been given to the Election Tribunal. Addition of candidates as respondents at any stage after the election petitions are referred to the Election Tribunal by the Election Commission, would therefore completely nullify the effect of the provisions made for fixing the time limits for presentation of election petitions to the Election Commission.

To clarify the question of limitation let us take the same extreme example. Suppose, the petitioner did not make the *returned* candidate a respondent in the original petition presented to the Election Commission. After the expiry of the period of limitation for presenting such election petition to the Election Commission and after the election petition is referred to the Election Tribunal, can the Election Tribunal permit the petitioner to join the returned candidate as a respondent in his petition? Certainly not. The same principle would therefore apply where the petitioner wants any other duly nominated candidate to be joined as a respondent.

It is important to note that Order 1 Rule 10 of the Civil Procedure Code for addition of parties is subject to the law of limitation, as laid down in sub-rule (5) of that Rule. It is well settled that under the Civil Procedure Code if any person is a *necessary* party to the suit, that is if the suit will not be a properly constituted one unless he is made a party, he cannot be added as a party on any ground after the period of limitation for the institution of such a suit; his addition after the period of limitation will entail the dismissal of the whole suit inasmuch as the suit becomes a properly constituted one only when he is made a party, and inasmuch as at that time the suit is barred against all. Here, under the provision of section 82 the candidates in question are necessary parties and unless they are added the election petition is not a properly constituted petition under the Act. The period of limitation for presenting the election petition having expired long ago, the candidates in question cannot be added as respondents at this stage, even if the provisions of Order 1 Rule 10 of the Code of Civil Procedure were applicable here.

On the point of limitation also, any other duly nominated candidate, who has not been joined as a respondent in the original election petition, cannot be joined as a respondent at this stage and the petitioner's application for amendment of the election petition to that effect cannot be allowed

The aforesaid candidates cannot therefore be joined as respondents by the Tribunal, either of its own motion or at the instance of the petitioner and the petition for amendment filed to that effect must be dismissed

The result therefore is that the non-joinder of the aforesaid candidates as respondents in the original election petition is a fatal, irremediable defect, for which the entire election petition must be dismissed. It would not therefore be necessary to enter into and decide other issues raised in the case.

(Sd.) S. B. SENGUPTA, *Chairman.*

The 29th January 1953.

(Sd.) N. K. GHOSE, *Member.*

JUDGMENT OF DR. G. SARAN, A MEMBER OF TRIBUNAL.

I have had the advantage to read the judgment of the Chairman and my learned brother Mr. Ghose, who is the other Member of the Tribunal. In their judgment the questions that arise for consideration in the case at this stage have been formulated.

One of the questions is founded on section 82 of the Representation of the People Act which required the petitioner to implead in the election petition all "the duly nominated candidates" as respondents. Therefore in the present election petition certain of the duly nominated candidates named in the judgment of my learned brothers who had withdrawn under section 37 of the Act not being impleaded as respondents the contention has been put forward that the election petition was vitally defective and that for non-compliance of section 82 of the Act in not impleading all the duly nominated candidates the election petition is not sustainable and must be dismissed on this account.

The second question for consideration relates to an application which the petitioner Muni Ram filed on 24th November 1952 to add the duly nominated candidates who have been omitted as respondents and it has been urged in this behalf that the Tribunal had no powers to add new parties and that the application will also be barred by limitation and must not be allowed.

As to the first question founded on section 82 the petitioner as an explanation in this behalf urged that the candidates who had withdrawn did not come within the terms "duly nominated candidates" used in the section. On this question of the meaning of the term I agree with my learned brothers, the Chairman and Mr. Ghose the other Member of the Tribunal. I need not repeat here the detailed discussion of the question which has been set forth by my learned brothers in their judgment. In agreement with their views I find that the candidates who had withdrawn their candidatures under section 37 came within the term "duly nominated candidates".

But the question, in my opinion, cannot rest here. I do not share the views of my learned brothers regarding the effect of non-compliance and omission to implead as respondents the "duly nominated candidates" who had withdrawn their candidatures and ther finding that the election petition for the failure to implead the duly nominated candidates must fail and be dismissed for non-compliance of section 82.

I do not agree with their views in regard also to the application filed by the petitioner to add the duly nominated candidates who were omitted as respondents in the election petition and their finding that this must not be allowed.

As to the question that the election petition was not sustainable on account of failure to implead the candidates who had withdrawn, the returned candidates who contested in the case relied mainly on the word "shall join" in section 82 and the general provision in section 80 of the Act that no election could be called in question except by an election petition presented according to the provision of part VI of the Act.

But it will be important to refer to section 85 and clause (4) of section 90 of the Act which provide respectively for the dismissal of the election petition by the Election Commission and the Tribunal. Both the two sections make mention of only sections 81, 83 and 117 which related respectively to the form of the election petition, the time within which it was to be presented and the security for costs which the petitioner was required to deposit and the Act in the specific way limited the summary dismissal of the election petition either by the Election Commission or the Tribunal with respect only to the matters provided by sections 81, 83 and 117. There is no provision anywhere in the Act to suggest that an election petition should fail for non-joinder of any duly nominated candidate and that the non-compliance of section 82 should have the far-reaching consequence as urged although in section 85 and elsewhere in the Act such as sections 33, 34 and 36 where mandatory force was intended that has been clearly expressed. This on reasonable grounds gives an indication that *ipso facto* failure of election petition without any further consideration was not contemplated as a consequence for the non-compliance in the matter of joinder of duly nominated candidates.

Section 90 of the Act referred to above has also importance in this behalf as discussed by me more fully in the election case of Mr. Fida Hussain. This section comprehensively gave independent right to all candidates, those who were duly nominated as well as others who claimed to be so, to appear and file their written statements either in support or opposition of the election petition after the publication of the election petition in the Gazette by the Tribunal, if they were not already

on the record. The class which claimed to be duly nominated could only be the rare and very unusual class of candidates who came in by challenging the correctness of the rejection of their nominations. It could include no other class, for even with regard to the nominated candidate who did not deposit the security for costs under section 117 it was provided by section 34 of the Act that he would not be deemed to be duly nominated candidate. The Legislature if they had meant to limit the scope of section 90 and confined the appearance after the publication of the election petition to only the rare and unusual body of the candidates who claimed to be duly nominated they should have said so in clear terms and not setforth the provision of section 90 in wide terms as it stands.

Next as discussed more fully in my judgment in the case of Mr. Fida Hussain, the Act which by sections 110, 115 and 116 gave right to the general body of electors to appear to continue or oppose the election petition in case of the death of the petitioner or respondent and when the application was filed to withdraw the election petition, by its general scheme made the proceeding to be one not for the individual interest of the petitioner or the contesting respondent, but for the general interest of the Constituency as a whole and the body of electors residing there. If not literally the same in all details; in essential spirit the proceeding in an election case was one of a representative character and similar to that provided in Civil Procedure Code by Order 1 Rule 8. This too shows the right of appearance given by section 90 to be one given to the candidates independently in their own right which could not be effected by ignorance, mistake or negligence on the part of the petitioner in not impleading him in the election petition.

As a result if a duly nominated candidate who had been omitted appeared after the publication of the election petition under section 90 his prayer which was based on his own independent right could not be rejected. The election petition which was defective for the absence from the record of the duly nominated candidate would have to be validated after the appearance and the proceeding allowed to be continued thereupon. But if section 82 had truly the mandatory effect in the far-reaching sense as urged, the election petition which was required by it to have all the duly nominatd candidates on the record from the outset could not be validated by any event arising at a subsequent stage such as that of appearance after the publication of the election petition in the Gazette by the Tribunal. Having given the independent right comprehensively to all the candidates as remarked above, the Act excluding the rare, unusual and indefinite class of candidates who claimed to be duly nominated candidates by assailing the scrutiny under section 36, seems to have required all the proper duly nominated candidates to be made parties at the early stage by section 82 as noted by me in the case of Mr. Fida Hussain in anticipation to obviate the delay that might be caused by their possible appearance at the late stage. In such circumstances the provision under section 82 could not be intended to be mandatory.

The same would appear to follow on the review of the general scheme of the Act and the frame of the proceeding. As evidenced by sections 110, 115 and 116 by which, as noted by me in the case of Mr. Fida Hussain, the electors were given the general right to appear at various stages when the petitioner or the respondent died or the application was filed for the withdrawal of the election petition, the proceeding in an election case broadly was of the nature of a representative proceeding provided in the Civil Procedure Code under Order 1 Rule 8 in the interest of the Constituency as a whole. This too along with section 90 as explained above militates against the argument that the election petition must fail for the failure to implead all the duly nominated candidates and section 82 to have the mandatory effect of the far-reaching character as urged.

The Civil Procedure Code providing by Order 1 Rule 9 that no suit must fail for non-joinder of parties makes a distinction between a proper party and a necessary party. By it the suit would fail only when the necessary party without whom no effective decree could be passed was absent from the record. But in the absence of what is termed "proper party" who was in some way interested but not such that their absence made the eventual decree altogether ineffective, the Court in spite of his absence will proceed and pass the decree which will be justified in the circumstance. This principle of the Civil Procedure Code, as noted in my judgment in the case of Mr. Fida Hussain seems to be in view when section 82 of the Act was framed. Having required the nominated candidates to be brought on the record at an early stage the Legislature seems to have left to the Tribunal to deal with the matter on merits on the principles of Civil Procedure Code. If a necessary party like the returned candidate was left, the election petition could not certainly proceed in his absence. But except such essential parties and others who were in some manner personally involved by the allegations

in the election petition, others must be regarded as mere proper parties. In the circumstance section 82 must be taken as a mere directory provision and it could not have the imperative force so that election petition should fail *ipso facto* for omitting to implead any of the duly nominated candidates.

The word "shall join" in section 82 upon which great stress has been laid also cannot be too strictly adhered to. W. F. Craise in his treatise on the law of interpretation (2nd Edition) at page 117 has remarked thus:—

> ".....Meaning of ordinary words when used in Acts of Parliament is to be found, not so much in strict etymological propriety of language nor even in popular use, as in the subject or occasion on which they are used and the object which is intended to be attained". Next referring to affirmative direction like that one finds in Section 82 W. F. Craise in his treatise has remarked—"No universal Rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory that implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature of carefully attending to the whole scope of the statute to be construed."

The same view as above has been set forth by Maxwell in his treatise on interpretation of statute (9th Edition) in Chapter 1 section 3 pages 20 to 23 and pages 372 to 373. The same principle again was laid down by the different High Courts in this country also and for this reference may be made to 11 C.W.N. page 1011 and 1943 Calcutta 266. So the word "shall join" in section 82 also will not help the respondent greatly.

Section 80 of the Act broadly should have meaning only to the effect that an election could not be challenged unless an election petition was filed. It will be wrong logic to give mandatory force indiscriminately to all the provisions in the Act some of which as has been shown above in regard to the very section 82 in question, may have been essentially only directory in character. The meaning and the force of the provisions have got to be considered independently and section 80 which was referred to on behalf of the contesting respondent will also not be helpful to him in this connection.

It appears that the Lucknow Tribunal in the election case of Shree Pritam Singh dismissed the election petition for failure to implead all the nominated candidates. In Duabia's election cases there were reports of cases which were dismissed on the same ground. But as I have shown in my judgment in Mr. Fida Hussain case the decisions in the cases reported in the book of Duabia, which were based on old Rules which were in force before the present Act and in which all the nominated candidates were required to be impleaded only when the petitioner claimed the declaration for the validity of his own election, could not be applied in the present case under the present law which provided for the impleading of the nominated candidates in all circumstances irrespective of the relief claimed on a different principle and not merely by the consideration of the individual interest which was the case with the old Rules.

As to the case of the Lucknow Tribunal it will be noted that as shown in the judgment in Mr. Fida Hussain's case there was no unanimity of decision on the question. In the circumstance with all respects I cannot adopt the views of Lucknow Tribunal in the present case. Having regard to the underlying basic scheme of the Act and the object and purpose of the provision of Section 82 "the duly nominated candidates" contemplated under section 82 in my view were mere proper parties. Unless the Tribunal finds from the allegations to be not justly possible to pass an order in their absence, it cannot for the mere failure to implead the duly nominated candidates dismiss the election petition.

Next as to the question if the candidates who had been omitted in the present case were necessary parties, I may point out that they had withdrawn their candidatures and had not appeared even after the publication of the election petition under section 90 though they had a right to that. There is also nothing in the election petition or even in the written statement affecting them personally. In the circumstances I consider that they were not the necessary parties and in my opinion in their absence without any injustice the proceeding in the election petition could proceed.

As mentioned by me in the case of Mr. Fida Hussain I have to note here that primarily by section 85 the power to dismiss the election petition had been reserved in the hands of the Election Commission. The Tribunal in true sense according

to the scheme in the Act was appointed mainly for the trial of the election petition on merits and under the old law the Tribunals were not given power to dismiss the election petition on technical grounds. Even under the present law when they have been given that power wide discretion had been left by clause (4) of section 90 in that behalf. Further from the judgments of Rewan and other places that were filed here it appears that in several cases the petitioners had failed to implead the candidates who had withdrawn and at Rewan out of eleven cases in eight such was the case. Here also out of six cases in three the petitioner did not implead the candidates who had withdrawn. Impression seems to have gone round that candidates who have withdrawn were not needed to be impleaded and in this behalf section 38 of the Act which required separate publication of the names of the candidates who remained to go to polls after withdrawal seems to have played a large part. A wrong impression will be no excuse against law, nevertheless the circumstances show that the petitioner in not impleading the nominated candidates named were under *bona fide* error and when the Tribunal had wide discretion, as remarked above, this also must be taken into consideration. In view of the facts and circumstances of the case in my opinion this election petition cannot fail for the nominated candidates named not being made parties.

The petitioner filed an application to add as parties the nominated candidates who had been omitted and for which the contention was raised here. As discussed in my judgment in Mr. Fida Hussain's case the provision of the Civil Procedure Code under Order 1 Rule 10 applied here. As the omitted candidates were mere proper parties, the question of limitation could not stand in the way. Therefore although as remarked by me above the omitted candidates were not necessary parties, still when the petitioner has filed an application it would be appropriate to add them as parties.

Therefore I do not share the views of my learned brothers, the Chairman and Mr. Ghose the other Member of the Tribunal and in conclusion I hold that the election petition was not vitally defective for the candidates named above not being impleaded. In my view the prayer of the petitioner to add the omitted candidates as respondents should also be allowed and I find accordingly in the case.

The 29th January 1953. (Sd.) GOVIND SARAN, *Member.*

ORDER OF THE TRIBUNAL

The position, therefore is that two of us, Mr. S. B. Sengupta and Mr. N. K. Ghose, are of the view that the entire election petition must be dismissed for non-joinder of the candidates in question, that these candidates cannot be added as respondents and that the petition for amendment filed by the petitioner to that effect must be dismissed. But the third Member Mr. Govind Saran disagrees and his view is that the election petition is maintainable and can proceed in the absence of the candidates in question and also that it will be more appropriate to add them as respondents as the petitioner has made the prayer to that effect.

Under section 104 of the Act if there is a difference of opinion amongst the Members of the Tribunal the opinion of the majority shall prevail and the orders of the Tribunal shall be expressed in terms of the views of the majority.

The order of the Tribunal therefore is that the entire election petition be dismissed with costs of Rs. 150 including pleader's fee, payable by the petitioner to the contesting respondent No. 1.

(Sd.) S. B. SENGUPTA, *Chairman.*
(Sd.) N. K. GHOSE, *Member.*
(Sd.) GOVIND SARAN, *Member.*

The 29th January 1953.

[No. 19/310/52-Elec.III.]

P. S. SUBRAMANIAN,
Officer on Special Duty

PRINTED IN INDIA BY THE MANAGER GOVT. OF INDIA PRESS, NEW DELHI
AND PUBLISHED BY THE MANAGER OF PUBLICATIONS, DELHI, 1953